In the Supreme Court
OF THE
United States

October Term, 1977

No. 77-46

Estate of Inez G. Fasken,
Deceased.

Kenneth Cory, as State Controller,
Petitioner,

vs.

David Fasken, as Executor, etc.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the State of California

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The Controller of the State of California, Division of Inheritance and Gift Tax, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California entered in the above entitled case on May 5, 1977.

OPINION BELOW

The Opinion of the Supreme Court of California is reported at 19 Cal. 3d 412 (1977) and is printed in Appendix A hereto, infra pp. 1-40. The opinion of the Court of Appeals is reported at 52 C.A.3d 859 and is printed in Appendix C hereto, infra pp. 44-52. The opinion of the Superior Court is printed in Appendix D hereto, infra pp. 54-79.

JURISDICTION

The Judgment of the Supreme Court was entered May 5, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

QUESTION PRESENTED

At issue is the validity of the California procedure for calculation of the element of its death tax which arises out of a federal credit for State Death Taxes under the Federal Estate Tax Law, when such credit is allocable to California and one or more other states.

STATEMENT OF CASE

Inez G. Fasken, who died in 1968 while a resident of California, devised and bequeathed her entire estate of $25,015,575.50, consisting of real and personal property located in California and Texas, to her son David Fasken. The maximum Federal Estate Tax Credit allowable under 26 U.S.C. § 2011 exceeded the

total normal inheritance taxes due to both California and Texas.

California computed its share of the credit by application of Revenue & Taxation Code Section 13441 and Regulation 13441-2 of Chapter 2.5 of Title 18, California Administrative Code. (Appendix B, infra, p. 41.) The normal inheritance taxes due California and Texas were subtracted from the Federal Credit and the difference was multiplied by the figure of 45.3131 per cent which was the percentage of the estate located within California.

Texas computed its share of the credit by multiplication of 54.6869 percent by the total credit without consideration of the normal inheritance taxes paid to either state. This sum was paid by the executor to Texas, resulting in total death taxes in excess of the Federal Credit.

The executor objected to the computation made by California. The California Supreme Court in its majority opinion held that California's regulation infringed upon jurisdictional limitations under federal due process concepts.

The dissenting opinion concluded that the California regulation asserts no direct or indirect claim to death taxes asserted by Texas and is a strict limitation on pick-up taxation according to the exact percentage of decedent's property located within the state's taxing jurisdiction and a complete deference to both inheritance and pick-up taxes claimed by other jurisdictions.

REASONS FOR GRANTING THE WRIT

1. THE CALIFORNIA SUPREME COURT HAS IMPROPERLY HELD THE CALIFORNIA METHOD OF APPORTIONMENT TO BE IN DEROGATION OF FEDERAL DUE PROCESS CONCEPTS.

The majority opinion has cited the three Opinions of the United States Supreme Court dealing with constitutionality of death taxes:

> *Maxwell v. Bugbee,* 250 U.S. 525, 40 S.Ct. 2, 63 L.Ed. 1124 (1919);
>
> *Frick v. Pennsylvania,* 268 U.S. 473, 45 S.Ct. 603, 69 L.Ed. 1058 (1925);
>
> *Treichler v. Wisconsin,* 338 U.S. 251, 70 S.Ct. 1, 94 L.Ed. 37 (1949); and its companion case,
>
> *Treichler, Executor v. Wisconsin* (per curiam), 340 U.S. 868, 71 S.Ct. 120, 95 L.Ed. 633 (1950).

The California court stated at page 426:

> "The United States Supreme Court has not since *Treichler II* [340 U.S. 868] undertaken to extend, withdraw or explain the limits of due process jurisdictional controls over state death taxes, including pick-up taxes. Because states assert their right to the federal state death tax credit by rules which are independently enacted and generally fail to take into consideration conflicting claims which may be asserted by sister states when multistate property is involved, . . . *the problem is particularly one which the United States Supreme Court can most effectively resolve.* Although the high court has failed to act in this area, it has indicated a more sympathetic view of the right of states to exact tax revenue in other related areas where formerly they were deemed to be limited by due process concepts." (Emphasis added)

In *Bugbee* the court approved a rule that permits states to set death tax rates reflective of decedent's total estate, wherever situated and irrespective of actual jurisdiction to tax.[1]

In *Frick* the court held only that a *direct* tax cannot be constitutionally imposed on real or tangible property out of state.

Treichler dealt with an emergency tax by the State of Wisconsin which allowed Wisconsin to pick up 100 percent of the credit without apportionment on the basis of the assets located in the States of Florida and Illinois, thus causing an *indirect* tax on foreign state property.

The California regulation does not tax property located outside its jurisdiction but results in an equitable proration of the excess of the state death tax credit allowable over the total of all death taxes imposed by all states.[2]

Therefore, the California regulation clearly is distinguishable from the three United States Supreme Court Opinions. It is entirely free of extra-territorial

[1]This Court has stated in *Bugbee:* ". . . inequalities that result not from hostile discrimination, but occasionally and incidentally in the application of a system that is not arbitrary in its classification, are not sufficient to defeat the law." (250 U.S. 525 at P. 543)

[2]This regulation has been in existence since 1945 and results in a total tax that cannot exceed the Federal Credit. It respects all other state taxes and apportions the credit according to the net percentage of the property subject to each state's jurisdiction.

overreaching and in no way purports to tax property in Texas.

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2. THE ALLOCATION OF THE FEDERAL CREDIT IS OF IMPORTANCE TO EVERY STATE

A "Uniform Death Tax Credit Act" was proposed in 1961 by the National Conference of Commissioners on Uniform States Law (cf. 2 Casner, Estate Planning, 3d Ed., 1976 Supp. to Vol. 2, p. 1892) which would have, if adopted, provided allocation substantially the same as provided by the California regulation which would give effect to the normal tax of each jurisdiction and allow all the states to share equitably in the credit.

There are a wide variety of statutes and regulations among the states that claim the credit.[3] When multiple states are involved taxes may be imposed which exceed the federal credit or create substantial doubt as to proper allocation among the various jurisdictions. Not only does this subject the individual estate to prolonged litigation and financial burdens but casts serious doubts upon the revenue of each state involved.

Therefore, it is imperative that this Court hear this matter.

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[3] *Estate of Fasken,* 19 Cal.3d 412, at page 422 n. 16.

CONCLUSIONS

In the years since *Treichler* was decided the high court has not issued a single decision dealing with the constitutionality of death or pick-up taxes. Moreover, the court in *Treichler* noted that a different question might be presented—if the statute in question authorized computation to begin only with the precise portion of the Federal Credit for state death taxes which were attributable to tangible property in Wisconsin. *Treichler v. Wisconsin,* 338 U.S. 251, 255 at footnote 3.)

It is, therefore, respectfully concluded that the California Supreme Court decision does not correctly interpret the view of the United States Supreme Court on this issue of import to every state.

Dated, July 5, 1977.

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(Appendices Follow)

APPENDICES

Appendix A

In the Supreme Court
of the
State of California

S.F. No. 23,409

Estate of
INEZ G. FASKEN,
Deceased.

KENNETH CORY, as State Controller,
Petitioner and Appellant,
vs.
DAVID FASKEN, as Executor, etc.,
Objector and Respondent.

[Filed May 5, 1977]

OPINION

WRIGHT, J.*—The State Controller appeals from an order fixing inheritance taxes in the matter of the estate of Inez G. Fasken, who died in 1968 while a resident of California. Decedent devised and bequeathed her entire estate, consisting of real and tangible personal property located in California and Texas, to her son David Fasken, the executor herein. He objected to the report of the inheritance tax referee purporting to determine death taxes due pursuant

*Retired Chief Justice of the Supreme Court sitting under assignment by the Acting Chairman of the Judicial Council.

to provisions of the Revenue and Taxation Code. The court sustained the objections and fixed the tax at an amount $463,858.00 less than that claimed by the Controller. The estate has paid the tax as so fixed.

At issue is the validity of the California procedure for calculation of that element of the tax which arises out of a federal "credit" of a portion of the federal estate tax, when such credit is allocable to California and one or more other states. The California procedure is prescribed in a regulation which is set out in the margin.[1] We have concluded for reasons which follow that the regulation infringes jurisdictional limitations under federal due process concepts and that the trial court fixed the tax at its jurisdictional limit. We accordingly affirm the judgment.

Because this case springs from a complicated and evolving relationship between federal and state tax law which empowers California to "pick up" tax revenue made available through a federal credit, it is helpful in the ascertainment of congressional and

[1]California Administrative Code, title 18, chapter 2.5, subchapter 1, regulation 13441-13442 (hereafter "regulation") reads in relevant part as follows: "In a case where a decedent leaves property the transfer of which is subject to the Inheritance Tax Law of this State, and leaves other property which is subject to the inheritance tax laws of other states, and the total of the taxes imposed by all of the states (excluding any additional or pick-up tax from any state's tax) is less than the maximum state tax credit allowed against the federal estate tax on the total estate by the federal estate tax law, an additional tax will be imposed by California in an amount which bears the same ratio to the difference between the total of the taxes imposed by all of the states and the maximum state tax credit as the net value of the property subject to the Inheritance Tax Law of this State bears to the net value of the property subject to the inheritance tax laws of all the states. . . ."

legislative intent to review pertinent statutory and case law developments in this area.

Development of Rules Relative to "Pick-up" Taxes

Since 1916 section 2001 of the Internal Revenue Code[2] has imposed a federal estate tax on all specifically nonexempt (see Int. Rev. Code, §§ 2011-2014, 2052-2056) property owned by persons residing in the United States at the time of their death. In the early years following enactment of the federal estate tax, a backlash of opposition emerged in Congress and among various other high placed government officials to the very concept of the federal government taxing a person's property at death.[3] Concurrent with this attitude of general resentment for the federal govern-

[2]Although the federal government's initial venture into the death tax field dates to a Revolutionary War era attempt to collect stamp tax revenue (Lowndes, Kramer & McCord, Federal Estate and Gift Taxes (3d ed. 1974) § 2.1, p. 7 [hereafter cited as *Lowndes*]), Congress enacted a modern version of the federal estate tax in 1916. (Act of Sept. 8, 1916, ch. 463, § 201, 39 Stat. 777.) Through a series of 20th century statutory amendments, Congress increased the scheduled federal estate tax rate from a maximum of 16 percent in 1916 to its present maximum of 77 percent. (Stephens, Maxfield, & Lind, Federal Estate and Gift Taxation (3d ed. 1974) 1-2; 1954 U.S. Code, Cong. & Admin. News, pp. 1441, 5105.)

[3]Treasury Secretary Andrew Mellon and numerous state governors who testified before the House Ways and Means Committee advocated complete elimination of the federal government's role in estate taxation. (See Hearings before Committee on Ways and Means of the U.S. House of Representatives, relative to the Revenue Act of 1924, p. 1 et seq.; see also Cogburn, *The Credit Allowable Against The Basic Federal Estate Tax for Death Taxes Paid to State Statutes Enacted to Take Advantage Thereof—Constitutional Difficulty and Some Suggested Solutions* (1952) 30 N.Car.L.Rev. 123 [hereafter cited as *Cogburn*]; see also *Lowndes,* § 20.3, p. 585.)

ment's incursion into an area providing "a traditional source of revenue to the states" (Turner, *The Gross Estate and the Death Tax Credit* (1971) 28 Wash. & Lee L.Rev. 254, 257 [hereafter cited as *Turner*]), several states nevertheless repealed long-standing death tax statutes,[4] "this being done to induce wealthy persons to move within their borders." (*Cogburn* at p. 123.)

Congressional response took form in the Revenue Act of 1924 (ch. 234, §301(b), 43 Stat. 253, 304) giving birth to what is now commonly referred to as the federal estate credit for state death taxes. (Int. Rev. Code, § 2011.) (See fn. 7 and 8.) Section 2011, subdivision (a) of the Internal Revenue Code permits legal representatives of estates to deduct from the

[4]As used throughout this opinion the term "estate tax" designates the tax assessed by the federal government against a decedent's estate pursuant to Internal Revenue Code section 2001; the term "credit for state death taxes" or "federal credit for state death taxes" designates the credit to be applied to the estate pursuant to Internal Revenue Code section 2011; the term "state death tax" or "death tax" designates the sum total of all taxes assessed against a decedent's estate by a state; the term "inheritance tax" designates that portion of the death tax which a state assesses against property located within its borders and included in a decedent's estate without consideration for the pick-up tax as defined below; the term "pick-up tax" designates that portion of the death tax which a state may assess in response to the federal credit for state death taxes and together with the inheritance tax constitute the sum total of state death taxes; the term "credit differential" designates the differential between the credit for state death taxes and the total of all state inheritance taxes.

The parties have raised no issues relative to the taxable situs of intangible property, if any. For purposes of our resolution herein we assume that the property of the estate consists of tangible property in California and other tangible property in Texas, and our discussions relate only to tangible properties.

total federal estate tax obligation[5] a limited, scheduled[6] credit for all death taxes actually paid[7] to any state on account of property taxable as part of the gross federal estate.[8] Architects of the credit clearly intended individual states to benefit from its creation, for section 2011 assures states a certain minimum of tax revenue at the expense of the federal treasury.

The original version of section 2011 set the federal state death tax credit at a maximum of 25 percent. Although a decedent's estate located in a state without a death tax would still incur the same federal liability

[5]Section 2011, subdivision (a), provides, in relevant part: "The tax imposed by section 2001 shall be credited with the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or the District of Columbia, in respect of any property included in the gross estate . . . ."

Deduction of the credit for state death taxes under section 2011 represents only one of five credits provided by the code. A decedent's estate may also deduct from the total federal estate tax bill varying amounts for federal gift taxes (§ 2012), estate tax on prior transfers (§ 2013), foreign death taxes (§ 2014) and death taxes on remainders (§ 2015).

[6]See generally section 2011, subdivision (b). Beginning with a taxable estate (gross estate less exemptions and expenses) in excess of $40,000, section 2011, subdivision (b), provides for a credit for state death taxes of 0.8 percent. The largest percentage credit, 16 percent, is reached on a taxable estate totalling more than $10,040,000.

[7]To qualify for a credit under section 2011, subdivision (a), a decedent's estate must actually incur some federal estate tax liability. The allowance of comparatively high federal estate tax exemptions enable relatively small estates to escape a federal tax even though there may be a substantial state death tax. Estates which fall into this category do not qualify for the federal credit and the state cannot assess a pick-up tax. (See Maxwell, Tax Credits and Intergovernmental Fiscal Relations (1962) p. 25 [hereafter cited as *Maxwell*].)

[8]This limitation means that death taxes paid on property subject to state but not to federal tax fail to qualify for the section 2011, subdivision (b) credit. (Treas. Reg. § 20.2011-1, subd. (a); *Second National Bank of New Haven v. United States* (2d Cir. 1970) 422 F.2d 40.)

as an estate situated in a state which imposed the tax, existence of the federal credit enabled all states for the first time to share in receipt of federally assessed tax revenue merely by enacting or amending their existing laws to pick up the federal credit.[9] Despite this incentive for states to take advantage of available tax revenue, dilatory and even contrary legislative action by some states quickly dispelled any notion that the 25 percent credit would provide a panacea for alleviation of resentment to federal government involvement or elimination of interstate death tax competition.[10] One commentator explained the situation that prevailed following passage of the 25 percent credit

[9]To make available the maximum death tax revenue states previously lacking statutory authority were encouraged to enact laws designed to pick up at least a portion of the section 2011 federal credit. States already possessing death tax statutes at the time Congress created the federal credit found themselves exploring whether existing statutes adequately assured receipt of their entire federal credit share; if found to be inadequate, states could amend their death tax laws to pick up the shortfall between extant death taxes and the maximum available credit under section 2011. However, as Congress increased both federal credit percentages (*Lowndes,* at § 20.3, p. 585) and absolute federal estate tax liability (see fn. 2, *ante*), death tax rates failed to keep pace. States currently benefit from the federal credit, therefore, largely because of the differential they are able to pick up; for reference purposes the federal credit picked up by way of supplemental state exactions has been described herein as the pick-up tax. (See fn. 4, *ante.*)

[10]Morton & Cotton, *Limitations on State Jurisdiction to Levy Death Taxes* (1951) 5 Miami L.Q. 449. State legislative action in Florida and Nevada illustrates perhaps the most extreme tactics designed to attract elderly, tax-conscious residents. Those states, by constitutional amendments, forbade the enactment of death taxes hoping that their tax havens and climates would attract rich domiciliaries. (*Maxwell,* at p. 21; see also Stephens et al., Federal Estate and Gift Taxation, *supra,* 3-7 to 3-8.)

in 1924: "[D]ue to the action of some states, it became apparent that if this matter were left solely to the states, competion would arise among the several states to revoke or lower their death taxes in an attempt to lure wealthy elders into those states with lower or nonexistent death tax burdens." (*Turner,* at pp. 257-258.) In 1926, therefore, Congress raised the federal tax credit to a maximum level of 80 percent (4 CCH Inheritance, Estate and Gift Tax Reporter, § 2500, p. 80,421) as a further attempt "to induce states to enact laws imposing death taxes." (*Cogburn,* at p. 124.)

By more than tripling the maximum available federal state death tax credit, Congress achieved a lasting solution to the twin problems of interstate death tax competition and general opposition to federal death taxation.[11] When state legislatures finally realized that the federal government actually intended to divert from its own treasury to individual state coffers vast sums of federally assessed tax revenue, the response was overwhelming: interstate death tax competition soon vanished, and at the present time every state in the nation except Nevada and the Dakotas levies death taxes which at least exhaust the state death tax credit. (4 CCH Inheritance, Estate and Gift Taxes Reporter, Multistate Compendium, pp. 70,111-70,633: ¶ 1100, p.

[11]*Cogburn,* at pages 124 and 125, concludes that these two issues overshadowed all others, adding: "Fear of multiple State taxation was not an actuating factor [in passage of the credit]." (See also Hearings before Committee on Ways and Means of the House of Representatives of the U.S., relating to the Revenue Act of 1924, p. 303.)

80,041.) Enactment of a state death tax credit enabling states to acquire all but 20 percent of estate tax revenues previously retained entirely by the federal government, moreover, placated critics of federal involvement in the death tax area by satisfying their "clamor for the abolition of Federal death taxation." (*Cogburn,* at p. 125.) Having placated its critics, however, Congress wasted little time in enacting an additional estate tax not subject to any credit, and the current credit as now scheduled in Internal Revenue Code section 2011 results from a combination of the two estate taxes in the 1954 recodification of the code with the credit never exceeding 16 percent of the combined tax. (See fn. 6, *ante.*)

Obviously cognizant of federal determination to furnish states with a larger portion of estate tax revenue, our Legislature adopted a pickup tax in 1927 (Rev. & Tax. Code, §§ 13441, 13442) calculated to assure this state its full share of the credit for state death taxes.[12] If an inheritance tax obligation falls short of the maximum credit for state death taxes scheduled in section 2011 of the Internal Revenue

[12]The current versions are found in sections 13441 and 13442 of the Revenue and Taxation Code.

Section 13441 reads as follows: "In the event that a Federal estate tax is payable to the United States in a case where the inheritance tax payable to this State is less than the maximum State tax credit allowed by the Federal estate tax law, a tax equal to the difference between the maximum credit and the inheritance tax payable is hereby imposed."

Section 13442 provides: "If no inheritance tax is payable to this State in a case where a Federal estate tax is payable to the United States, a tax equal to the maximum State tax credit allowed by the Federal estate tax law is hereby imposed."

Code, section 13441 of the Revenue and Taxation Code imposes a pick-up tax equal to the difference. (See fn. 15.) Section 13441, moreover, has been construed in the absence of multistate claims to the federal credit as vesting the state with an independent right to receive the entire credit differential between the allowable[13] state death tax credit and state death taxes, with or without the benefit of the enabling authority of section 2011 of the Internal Revenue Code, irrespective of whether a decedent's estate waived the credit and paid the full estate tax to federal authorities,[14] and even though compliance with the state's demand forces the estate to assume the onus of double taxa-

[13]Although federal (Int. Rev. Code, § 2011, subd. (b)) and state (Rev. & Tax. Code, §§ 13441, 13442) statutes employ the word "allowed" to define the amount of federal credit returnable to the states, in *Estate of Good* (1963) 213 Cal.App.2d 45, 48-49 [28 Cal.Rptr. 378], the court held that the word really refers to "allowable" credit rather than credit "actually allowed" by the federal government, as alleged by decedent's executors. California's practicing bar is now so instructed: "[T]he state's right to additional tax [the credit differential] is *not* dependent on the actual allowance of the credit by the federal government." (Cal. Inheritance Tax Practice (Cont.Ed.Bar 1973) § 1327, p. [illegible], italics added.)

[14]In *Estate of Good* (1963) 213 Cal.App.2d 45 [28 Cal.Rptr. 378], because of the manner in which certain federal estate tax credits were to be calculated, it was to the estate's advantage to fix at the maximum the federal estate tax obligations by foregoing the credit for state death taxes (Int. Rev. Code, §§ 2001, 2011) if by so doing the estate was relieved of the obligation for the state's pickup tax (Rev. & Tax. Code, § 13441). To require the estate to pay both the undiminished federal estate tax and California pickup tax, the estate argued, would require an unconstitutional double payment of the $17,527.90 credit differential. The court nonetheless rejected the estate's contention and announced California's independent right to the full credit differential even though the estate had not claimed the credit for state death taxes as provided in Internal Revenue Code section 2011.

tion.[15] (*Estate of Good, supra,* 213 Cal.App.2d 45, 48-50; see also *Estate of Callaway* (1968) 263 Cal.App. 2d 795, 798-801 [69 Cal.Rptr. 921]; *Estate of Amar* (1967) 255 Cal.App.2d 404, 407-409 [63 Cal.Rptr. 444]; accord *Wells v. Gay* (Fla. 1952) 58 So.2d 690; *State v. Weiss* (1943) 141 Tex. 303 [171 S.W.2d 848, 147 A.L.R. 460]; *Matter of Thalmann* (1941) 177 Misc. 1055 [32 N.Y.S.2d 695].)

The Conflict in Claims to the State Death Tax Credit

Although *Good, Amar, Callaway* and other decisions by sister states firmly establish state individual entitlement to the full credit differential, even when both federal and state payments are thereby forced upon a taxpayer, these cases do not by themselves substantiate the Controller's present claim for unpaid taxes. The executor in the instant case does not dispute a state's authority to levy a pick-up tax covering the full credit differential when all tangible estate property is located in one state. He argues instead that California purports to tax only a pro rata share of the full credit differential in an estate having multistate property, but utilizes a constitutionally impermissible apportionment to determine that share.

[15]In common parlance, taxing the same asset twice is taken to mean double taxation. Legally, however, the mere fact that two separate taxing entities, such as California and Texas or the federal government and California, may levy taxes on the same asset, and thus tax double, does not necessarily result in a constitutional transgression. In *Good* the court explained: "To constitute [objectionable or prohibted double] taxation, the two taxes must be imposed on the same property, *by the same state or government,* during the same taxing period, for the same purpose. Indirect duplicate taxation is not objectionable." (*Estate of Good, supra,* 213 Cal.App.2d 45, 51, italics added; see also 1 Cooley, Taxation (4th ed.) § 223 et seq.)

The regulation urged by the Controller as warranting the challenged procedures was promulgated in its present form in 1945. It purports to implement the same federal objective of picking up tax revenue made available to states as do the statutes adopted by legislative action in 1927. It is concerned, however, with only those particular estates, like decedent's in the present case, which consist of both California and out-of-state property. The governing statutes, on the other hand, do not expressly deal with such particular situations. The regulation, accordingly, provides for the application of statutes in a particular situation in which the statutes are silent.[16]

[16]To attain a perspective of California's regulation, a brief overview of the veritable *melange* of pick-up taxes in other states which currently exert inconsistent, often overlapping claims against the state death tax credit may be useful.

State efforts to absorb, or pick up, the state death credit fall, wiht roughly equivalent frequency, into one of three general categories. (See 4 CCH Inheritance, Estate and Gift Tax Reporter, ¶ 1100, p. 80,041, ¶ 2560, pp. 80,423-80,424; Multistate Compendium, pp. 70,111-70,633.) States in the first category, after subtracting from the amount allowable by Internal Revenue Code section 2011 as the state death tax credit all or a portion of the inheritance taxes of all other states, absorb the entire credit differential without apportioning it with those other states which exercise jurisdiction over some portion of the decedent's assets. A second category of states determine the percentage of decedent's overall estate lying within the resident state's taxable jurisdiction and then simply assess a "gross" tax equivalent to such percentage of the total of the credit for state death taxes, without reference to the amount of inheritance taxes assessed by other states. The third category, including California, follow a procedure which requires first subtracting from the scheduled maximum state death tax credit the inheritance taxes of all states wherein some portion of decedent's property is located, and then apportioning such credit differential according to the percentage of property owned by decedent in each state.

In the instant case California exercises uncontested jurisdiction over estate property having a value of $11,384,060.34 representing 45.313 percent of the total worth of the estate. Texas assessed "nonresident" inheritance taxes against property having a worth of $13,631,515.16, representing of the total worth 54.6869 percent of the estate.[17] Following the inheritance tax referee's report of death taxes due the State of California in the amount of $2,007,765.19 ($1,509,279.32 in inheritance taxes and $498,485.87 in pick-up taxes) the executor complained inter alia that should the pick-up tax be fixed in the reported amount it would constitute "a deprivation of . . . property without due process of law" in violation of state and federal constitutional guarantees.[18] The court fixed the pick-up tax at $34,627.87, $463,858.00 less than that reported by the referee.

The executor has paid the entire sum of $1,863,291.14 in death taxes as assessed by Texas authorities. According to the executor the estate's total California death tax liability should amount to no more than the credit for federal state death taxes ($3,407,198.33) less the total death taxes assessed by and paid to Texas ($1,863,291.14), that amount being $1,543,907.19. As the California inheritance tax represents $1,509,279.32 of this amount, the pick-up tax should be the balance,

[17]At the time of her death a vast majority of decedent's Texas assets consisted of working and nonworking interests in mineral deposits of an undisclosed nature.

[18]In addition to the due process contention now raised on appeal, the executor made in the trial court three nonconstitutional objections to the referee's report, none of which has survived for consideration on appeal.

$34,627.87. The executor relies on substantive due process limitations as requiring the analysis he urges, and we next examine such limitations.

Jurisdictional Due Process Limitations on a State's Power to Levy Death Taxes

The executor focuses his attack on what he claims to be jurisdictional excesses in the pickup tax as calculated pursuant to the regulation. Our research reveals that the United States Supreme Court has on only three occasions addressed itself to issues bearing on the constitutionality of death taxes. In two of such instances the court held there to be a constitutional infringement when a state law attempted to impose on out-of-state property either a direct or an indirect tax which would interfere with the right of the state in which such property was located to collect revenue attributable thereto.[19]

In *Frick v. Pennsylvania* (1925) 268 U.S. 473 [69 L.Ed. 1058, 45 S.Ct. 603, 42 A.L.R. 316], the high court invalidated a segment of Pennsylvania's death

[19]In the third case, *Maxwell v. Bugbee* (1919) 250 U.S. 525 [63 L.Ed. 1124, 40 S.Ct. 2], the court upheld a New Jersey death tax which took into account the full value of a decedent's multistate assets as the basis for fixing the *rates* for calculating New Jersey death taxes levied on property within the borders of that state. Rejecting the contestant's claim that this method of computing the tax resulted in a deprivation of property without due process of law "because it in effect taxes property beyond the jurisdiction of the State" (*id.*, at p. 539 [63 L.Ed. at p. 1131], the court bestowed its blessings on a rule which permitted states to set death tax rates reflective of a decedent's total estate, wherever situated and irrespective of actual jurisdiction to tax. There is no challenge in the instant case to California's rate of taxation. What is challenged is California's right to apply its rate to property outside its borders.

tax law which sought to impose exactions on tangible property, the largest part of which consisted of a New York City art collection. Acknowledging that the issue was one of first impression, the court held that "while a State may so shape its tax laws as to reach every object which is under its jurisdiction, it cannot give them any extraterritorial operation." *(Id.,* at p. 489 [69 L.Ed. at p. 1062].) *Frick* thus stands for the proposition that a *direct* tax on out-of-state taxable personal and real property constitutes a reach of constitutionally impermissible dimensions.

In its final decision dealing with the permissible reach of a state death tax the Supreme Court denounced a 30 percent emergency tax enacted to fund World War II rehabilitation projects and calculated as a surtax on the Wisconsin death tax. (*Treichler v. Wisconsin* (1949) 338 U.S. 251 [94 L.Ed. 37, 70 S.Ct. 1].) In *Treichler* there was a federal credit for state death taxes of $630,709.62. The Wisconsin inheritance tax was $220,682.12 and the combined inheritance taxes on property of the decedent in Florida and Illinois were $57,325.71, leaving a total credit differential of $352,701.79. Wisconsin claimed the whole of the credit differential as a pick-up tax, designated by the Wisconsin statute as an "estate tax." No proper challenge was made to such claim, and the Supreme Court held *only* that the *emergency tax* offended due process. That tax was calculated as 30 percent of the Wisconsin death tax (the sum of the inheritance and pick-up taxes), but because Wisconsin purported to pick up *all* of the credit differential its death tax was the equiva-

lent of the federal credit for state death taxes less the combined inheritance taxes of Florida and Illinois.

Although the basis for the disapproval of the Wisconsin emergency tax is not clearly stated, we read the opinion to hold that because of the federal credit for state death taxes is "rated and measured by the entire estate, regardless of situs," no state can assert a claim to *all* of that credit when some taxable portion of the estate is located in another state. *(Treichler v. Wisconsin, supra,* 338 U.S. 251, 254 [94 L.Ed. 37, 41].) Likewise, Wisconsin could not measure its emergency tax as a percentage of the whole of that credit. It did not, of course, measure its emergency tax as a percentage of the whole of that credit, but rather as a percentage of the whole of that credit *less* the inheritance taxes assessed by Florida and Illinois. But the Supreme Court was nevertheless of the view that even though Wisconsin had made an allowance for the Florida and Illinois inheritance taxes, such allowance had "no necessary relation to the proportion of property outside Wisconsin." *(Id.* at p. 255 [94 L.Ed. at p. 42].) Although it declined to express any opinion thereon, the Supreme Court noted that a "different question might be presented . . . if the statute in question authorized" computation to begin with only that precise portion of the federal credit for state death taxes which was attributable to tangible property in Wisconsin. (*Id.*, fn. 3 [94 L.Ed. at p. 42].) The court concluded that Wisconsin had "authorized a tax on property rated and measured in part by tangible property, the situs of which was outside Wisconsin. . . .

Wisconsin's statute may be more sophisticated than Pennsylvania's, but in terms of ultimate consequences this case and the Frick case are one."[20] (*Id.,* at p. 256 [94 L.Ed. at p. 42].)

After remand from the United States Supreme Court, Wisconsin recomputed its emergency tax. It determined that portion of the federal credit for death taxes attributable only to property within the borders of Wisconsin which basis it used for computation of the emergency tax. (See *Estate of Miller* (1950) 257 Wis. 439 [43 N.W.2d 428].) In a per curiam decision the United States Supreme Court affirmed the Wisconsin Supreme Court judgment on remand, insofar "as the appeal attacks the validity of the computation of appellant's tax under the Wisconsin Emergency Tax on Inheritances." *(Treichler, Executor v. Wisconsin* (1950) 340 U.S. 868 [95 L.Ed. 633, 71 S.Ct. 120].) Insofar as the appeal attacked the Wisconsin pick-up tax, however, the appeal was dismissed, "that portion of the judgment of the Wisconsin Supreme Court resting on an adequate nonfederal ground." *(Id.)*[21]

[20]As presented to us, we are concerned with only the jurisdictional basis for measuring the California pick-up tax, that is, the value of the property over which California may properly assert jurisdiction. No issue is raised as to the *rate* of taxation, that is, the portion of that taxable basis which may be assessed as a tax. The foregoing quotations from *Treichler* suggest that the Wisconsin tax failed on constitutional grounds because it was both "rated and measured" on property not within Wisconsin's borders. Although such language may cast some doubt on the continuing validity of *Maxwell v. Bugbee, supra,* 250 U.S. 525 (see fn. 19, *ante*), we note that *Frick,* on which *Treichler* purports to rely, expressly reaffirms the *Maxwell* rule. There was, further, no rating problem presented in *Treichler.* Insofar as appears Wisconsin did not attempt to "rate" either its inheritance or pick-up tax on property outside its borders although, as appears in our analysis of the United States Supreme Court decision, it "measured" its pick-up tax on outside property. There likewise was no rating problem in its emergency tax as the statute provides for a flat 30 percent surtax independently of the gross multistate value of the decedent's estate. To the extent that *Treichler* may be deemed to be inconsistent with *Maxwell,* its views are probably dicta (see *Cogburn,* at p. 135), but in any event we are not now concerned with a rating problem.

Neither the United States Supreme Court *Treichler* opinions nor the reported opinions of the Wisconsin Supreme Court *(In re Miller's Estate* (1948) 254 Wis. 24 [35 N.W.2d 404], and *Estate of Miller, supra,* 257 Wis. 439) disclose the "adequate nonfederal ground" upon which the United States Supreme Court declined to question the propriety of Wisconsin's pick-up tax. It is manifest, however, that although the Wisconsin pick-up tax was not under attack, it necessarily suffered from the same constitutional infirmity which rendered the emergency tax invalid. This follows from the fact that the emergency tax was but a fixed portion of the death tax. If the emergency tax was constitutionally defective because it reached property outside Wisconsin's borders, then the death tax, which was the basis for the measure of the emergency tax, necessarily also reached such outside property. As the inheritance tax component of the death tax was assessed only on property within Wisconsin's borders (see *Treichler v. Wisconsin, supra,* 338 U.S. 251, 253 [94 L.Ed. 37, 41]) the remaining component, the

[21]In the first *Treichler* opinion, the Supreme Court stated that the Wisconsin statute dealing with the pick-up tax "is not under explicit attack here." *(Treichler v. Wisconsin, supra,* 338 U.S. 251, 253 [94 L.Ed. 37, 41].) We will hereinafter designate the first and second Treichler opinions as *Treichler I* and *Treichler II,* respectively.

pick-up tax, had to have been assessed against property lying at least in part outside Wisconsin. This was recognized by the Wisconsin Supreme Court when, on remand and recomputation of the emergency tax, the court recognized a computation factor which it described as "Wisconsin Estate Tax measured by property out of Wisconsin." *(Estate of Miller, supra,* 257 Wis. 439, 441, fn. 1.) As noted above, the Wisconsin statute assessed the whole of the credit differential as a pick-up tax, although some part of the decedent's estate was located in both Florida and Illinois.

The United States Supreme Court has not since *Treichler II* undertaken to extend, withdraw or explain the limits of due process jurisdictional controls over state death taxes, including pick-up taxes. Because states assert their right to the federal state death tax credit by rules which are independently enacted and generally fail to take into consideration conflicting claims which may be asserted by sister states when multistate property is involved, and because the conflicts have been created by federal legislation which encourages the states to make such claims while not defining the limits thereto, the problem is peculiarly one which the United States Supreme Court can most effectively resolve. Although the high court has failed to act in this area it has indicated a more sympathetic view of the right of states to exact tax revenue in other related areas where formerly they were deemed to be limited by due process concepts. (See, e.g., *Standard Steel Co. v. Wash. Revenue Dept.* (1975) 419 U.S. 560 [42 L.Ed.2d 719, 95 S.Ct. 706];

Nat. Bellas Hess v. Dept. of Revenue (1967) 386 U.S. 753 [18 L.Ed.2d 505, 87 S.Ct. 1389]; *Scripto v. Carson* (1960) 362 U.S. 207 [4 L.Ed.2d 54, 80 S.Ct. 52]; *Williamson v. Lee Optical Co.* (1955) 348 U.S. 483 [99 L.Ed. 563, 75 S.Ct. 461]; *Braniff Airways v. Nebraska Board* (1954) 347 U.S. 590 [98 L.Ed. 967, 74 S.Ct. 757]; *Nelson v. Sears, Roebuck & Co.* (1941) 312 U.S. 359 [85 L.Ed. 888, 61 S.Ct. 586, 132 A.L.R. 475]; *U. S. v. Carolene Products Co.* (1938) 304 U.S. 144 [82 L.Ed. 1234, 58 S.Ct. 778]; see also *Sea-Land Service, Inc. v. County of Alameda* (1974) 12 Cal.3d 772 [117 Cal.Rptr. 448, 528 P.2d 56]; *Scandinavian Airlines Systems, Inc. v. County of Los Angeles* (1961) 56 Cal. 2d 11 [14 Cal.Rptr. 25, 363 P.2d 25].)

Jurisdictional Excesses Under the California Regulation

It seems clear, as pertinent to the issues at hand, that under prevailing decisions each of several states may levy against an estate consisting of multistate property, an inheritance tax measured by the property within that state's boundaries, the amount of which tax is not limited by or otherwise dependent in any way on the federal credit for state death taxes. Even a single state may levy and collect, without raising a jurisdictional question, an inheritance tax which, by itself, exceeds the federal credit. This is true because the state in assessing a true inheritance tax as defined herein (see fn. 4, *ante)* applies its taxing rate to only in-state property. A state need not apportion that element of its death tax which consists of an in-

heritance tax so calculated. A different problem is presented, however, when the state levies an inheritance tax which is a lesser amount than the federal credit for state death taxes and then seeks to "pick up" all or a portion of the credit differential when multistate property is involved. The different problem arises because the credit differential is measured by the *total* of multistate properties, and *Frick* teaches us that a state making a claim thereto is limited by that portion attributable to property within that state. The pick-up tax must, accordingly be apportioned.[22] The critical question is how that apportionment is to be made. The executor urges that we must look to the *Treichler* opinions for an answer and, not without some confusion, we next proceed to do so.

In *net effect* the computation of the pick-up tax as approved by the United States Supreme Court in *Treichler II* started with the federal credit for state death taxes and deducted therefrom that portion of the credit which, because it was attributable to out-of-state property, was unavailable in Wisconsin. The balance of the credit was deemed to be within the jurisdictional reach of Wisconsin. The pick-up tax,

[22]Although it did not expressly so hold, we have, for reasons appearing above, construed *Treichler I* to stand for the proposition that the pick-up tax must be apportioned. What was actually disapproved in *Treichler I* for want of apportionment, of course, was the Wisconsin emergency tax which was in reality merely a surtax on the unapportioned pick-up tax. As we noted above, if the surtax offended constitutional proscriptions, then the basic tax necessarily suffered the same constitutional infirmities, and we can properly conclude that *Treichler I* stands for the proposition that the pick-up tax must be apportioned if it is to conform to constitutional requirements.

accordingly, was calculated to be the difference, if any, between the available credit and the inheritance tax.[23]

We note from our readings of the *Treichler* opinions that the allowable pick-up tax which may be levied by one state in a situation where there is multistate property in a decedent's estate, is not dependent upon the death taxes levied by another state exercising jurisdiction over any of the property involved. Each state according to the *Treichler* formula may properly levy a pick-up tax which is calculated by first apportioning the federal state death tax credit according to the ratio of property which lies within its borders, and then reducing that apportioned credit by its inheritance tax. The balance of the apportioned credit constitutes the pick-up tax.

If we apply the *Treichler* formula to the situation at hand, California may levy a pick-up tax which is equal to the federal credit for state death taxes

[23]The calculation as reported by the Wisconsin Supreme Court is set out in *Estate of Miller, supra,* 257 Wis. 439, 441, footnote 1. Although the calculation as reported, first subtracts out and then adds in the out-of-state inheritance taxes and for that reason appears to be more complex than the simple computation described in the text above, in net effect the calculation as reported in *Estate of Miller* is the same as that related above.

On the basis as related in the text above the computation may be represented as follows:

Wisconsin Emergency Tax:

Federal Credit	$ 630,709.62
87½ percent attributable to Wisconsin property (representing Wisconsin's inheritance tax of $220,682.13, and $331,188.80, the amount which properly would have been available as a pick-up tax)	$ 551,870.92
30 percent emergency tax	$ 165,561.28

The $165,561.28 emergency tax as calculated above is identical to the sum of the two components of the emergency tax ($66,204.64 and $99,356.64) as computed in *Estate of Miller, supra,* 257 Wis. 439, 441, footnote 1.

($3,407,198.33) apportioned to the ratio of property in California (.453131), or $1,543,907.19, less its inheritance tax ($1,509,279.32), or $34,627.87. This is the precise amount of pick-up tax fixed by the trial court. The California regulation, however, produces a larger tax. The computation of that tax, when compared to the computation under the *Treichler* formula, is as follows:

		Regulation	Treichler
Federal credit for state death taxes		$ 3,407,198.33	$ 3,407,198.33
Less Inheritance Taxes			
California	$1,509,279.32		
Texas	797,826.84		
		2,307,106.16	
Total credit differential available for pick up per regulation		1,100,092.17	
Portion of estate located in California		.453131	.453131
California share of credit differential (pick-up tax) per regulation		498,485.87	
Total federal credit apportioned to California per *Treichler* formula			1,543,907.19
Less California inheritance tax			1,509,279.32
California pick-up tax per Treichler formula			$ 34,627.87

Although the computation under the regulation produces a different and larger pick-up tax than under the *Treichler* formula, it does not necessarily follow that the regulation results in a constitutionally impermissible tax. *Treichler II* holds only that the Wisconsin apportionment does not offend constitutional limitations. But there is no holding that the formula establishes the outer limits of permissible taxation. A different apportionment, even though it may exact a

heavier tax in a given situation, would also be constitutionally permissible if in so apportioning the taxing state confines its jurisdictional reach within its own borders. The Controller contends that the California regulation provides for such an apportionment.

If we recognize, as we have, that there are components of the federal credit for state death taxes which California cannot pick up, the problem becomes one of separating out those components with reasonable certainty. It is not enough that the separated components be significant in degree or quantity. It is essential, however, that the quality of the separation or apportionment be such that it results in a rational measure of California's entitlement to claim a portion of the federal credit. Moreover, California's entitlement should depend on factors pertinent to property or apportioned property within California's jurisdictional control. Its entitlement should not depend on how one or more of the other states with a right to levy inheritance or pick-up taxes proceed to do so. Should, for instance, a sister state with some portion of estate property located within its borders elect not to assert its claim for a share of the federal credit, California's entitlement should not thereby be enlarged or otherwise affected as any increased apportionment in California's favor would extend its jurisdictional reach to the sister state's property. With these concepts we proceed to examine the computation under the California regulation.

We note at the outset that while under the *Treichler* formula the federal credit is immediately apportioned,

under the regulation the federal credit is reduced by the inheritance taxes involved before it is apportioned. The resulting "total credit differential" does not, however, necessarily represent the total credit available as pick-up taxes. This follows from the fact that states have an almost unlimited right to fix the amount of the inheritance tax at nothing or at an amount which may exceed the federal credit. If Texas, for instance, fixed its inheritance tax at an amount greater than the total federal credit then, under the regulation, California would be entitled to no pick-up tax although some significant portion of the federal credit (which portion may exceed the California inheritance tax) was attributable to California property. Under the *Treichler* formula the amount of the Texas inheritance tax does not affect California's right to pick up its share of the credit differential. Conversely, if Texas assessed no inheritance tax although estate property was located therein, under the regulation the "total credit differential available for pick up" would include credits attributable to estate property located in Texas. California would nevertheless pick up such credits under the computations pursuant to the regulation, and thus impermissibly extend its jurisdictional reach into Texas. Under the *Treichler* formula the failure of Texas to levy an inheritance tax on estate property located in Texas would not affect California's right to pick up its share of the credit differential.

Although we have dealt only with the extreme situations, it is manifest that there are intermediate im-

permissible taxing situations under the regulation.[24] It is also apparent that the regulation, while purporting to apportion, does not do so in a manner which truly reflects California's entitlement in every situation. The regulation, in fact, imposes a computation which in one important respect was found wanting in *Treichler I*. Wisconsin had first subtracted from the federal credit the states' inheritance taxes to arrive at a balance which it used to calculate its pick-up and emergency taxes. In commenting on this, the United States Supreme Court noted that such procedure had "no necessary relation to" a proper apportionment of the estate property. *(Treichler v. Wisconsin, supra,* 338 U.S. 251, 255 [94 L.Ed. 37, 42].) The California regulation provides for an identical computation in determining the credit differential available for pick up. The reason for the disapproved apportionment in *Treichler I* is thus equally applicable in the instant case, as the regulation is not necessarily related on a jurisdictional ground to California's entitlement to pick up its fair share of the federal credit for state death taxes. The regulation, accordingly, must fail on federal constitutional grounds. It does not follow that the California statutes (Rev. & Tax. Code, §§ 13441, 13442) infringe constitutional prohibitions. The statutory language, unlike the direction contained in the

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[24]In the case at hand for instance Texas would, apart from federal considerations, have levied a relatively small inheritance tax. The effect, under the regulation, would have been to produce a "credit differential available for pick up" which would have been disproportionately large in favor of California. Under the *Treichler* formula the credit differential available for pick up by California, does not vary whatever the Texas inheritance tax.

regulation, does not require an interpretation which extends the Controller's reach beyond jurisdictional limits and must be construed to withstand constitutional challenge. The "maximum state tax credit" and "maximum credit" referred to in sections 13441 and 13442 are accordingly deemed to mean that portion of the federal credit for state death taxes, which is attributable to California property as determined under the *Treichler* formula.

We have carefully examined the basis upon which the trial court fixed the pick-up tax in the instant case. We are in accord with its analysis of the controlling decisions and conclude that it properly fixed that tax in the amount of $34,627.87, and the total death tax in the amount of $1,509,279.32.

The judgment is affirmed.

Tobriner, Acting C. J., Clark, J., Richardson J., and Sullivan, J.,† concurred.

MOSK, J.—I dissent.

Justice Tom Clark wryly observed in *Holland v. United States* (1954) 348 U.S. 121, 128 [99 L.Ed. 150, 160, 75 S.Ct. 127], that "bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them." In view of the complexity of the problem involved in this litigation and the box-car figures which seem to have acquired a being of their own, it would be the easiest course to

†Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

simply agree with the majority and to join in yielding to the taxpayer the substantial immunity he claims. Unfortunately to adopt that course requires us to embrace the Texas scheme of tax computation in total disdain of this state's apportionment regulation of more than three decades' vintage. I can see no persuasive reason for California to assume such magnanimous self-denial.

I need not repeat the facts, the regulations, or the respective claims of the litigants, since they are adequately related in the text of the majority opinion. I pause merely at the outset to observe that California's procedure for multistate division of the credit differential is entirely consistent with the version recommended to states and approved by the National Conference of Commissoners on Uniform State Laws and the American Bar Association House of Delegates. (Cf. 2 Casner, Estate Planning (3d ed., 1976 supp. to vol. 2) p. 1892.) If adopted by all states, California's apportionment regulation would guard against imposition of combined pick-up and death taxes in excess of the maximum federal credit, for deduction of each state's death taxes from the credit differential, by definition, enables absorption of only a residual credit differential; and percentage apportionment of the residual then prevents decedent's total tax bill from exceeding the original federal credit. Unfortunately some other states exhibit a pecuniary aggressiveness that causes them to misconstrue the concept of pick-up taxes and, instead of apportioning the credit differential by reference to their respective proportions of

federal taxable property or available credit differential, appropriate the entire credit differential without regard to either competing claims of sister states or the independent right of other states to impose their death taxes.

While decedent indisputably resided in California at the time of her death and assets comprising her sizeable estate were almost equally divided between Texas and California, the executor has demonstrated a clear preference for Texas by electing to pay the entire sum of $1,863,291.14 in death and pick-up taxes requested by Texas authorities ($797,826.84 in Texas death taxes plus $1,065,464.30 in additional pick-up taxes) but refusing to remit more than $1,509,279.32 of the $2,007,775.19 in total taxes due California, as claimed by the Controller (all of this state's death taxes but none of the $498,485.87 in pick-up taxes). If the executor had followed the referee's calculation under the regulation, California could have realized its full share of tax revenue while leaving unaffected whatever assessment Texas chose to make against the estate:

California death taxes	$1,509,279.32
Texas death taxes	797,826.84
Total	$2,307,106.16
Total federal credit	$3,407,198.33
Less: total death taxes	2,307,106.16
Available credit differential	$1,100,092.17
Percent of estate located in Calif.	45.3131
California share of credit differential	$ 498,485.87

Instead, the executor disregarded the above method of calculation and now contends that its California tax liability should amount to no more than the reciprocal share of the federal credit remaining after payment of total taxes charged by Texas authorities ($1,863,291.14) without reference to deduction of either state's death taxes. Thus the executor asks us to embrace the Texas scheme of tax computation and to ignore that adopted by our taxing authority. It is not out of chauvinism that I conclude the California method is equally rational and clearly permissible.

The majority correctly note that there are only three Supreme Court decisions addressing the constitutionality of death or pick-up taxes. In each case in which the court found a constitutional violation, it condemned state law for attempting to impose either a direct or an indirect tax on out-of-state property, thereby denying foreign states the right to collect revenue attributable to property lying within their jurisdictions.

California's regulation, by contrast, specifically eschews any interference with Texas' right to assess and collect the maximum amount of death and pick-up taxes allowed under Texas and federal law and thus carefully avoids the legal pitfalls of an attempted tax on either out-of-state property or revenue attributable thereto. Accordingly, the leitmotif of the three high court decisions that sketch permissible constitutional boundaries for death and pick-up taxation furnishes persuasive support for sustaining the California regulation.

The first opinion was *Maxwell v. Bugbee* (1919) 250 U.S. 525 [63 L.Ed. 1124, 40 S.Ct. 2], in which the court upheld a New Jersey death tax that took into account the full value of a nonresident decedent's multistate assets for determining New Jersey death tax rates. Rejecting the contention that this method of computing the tax resulted in a deprivation of property without due process of law "because it in effect taxes property beyond the jurisdiction of the State" (*id.*, at p. 539 [63 L.Ed. at p. 1131], *Bugbee* approved a rule that permits states to set death tax rates reflective of decedent's total estate, wherever situated and irrespective of actual jurisdiction to tax.

Six years later, in *Frick v. Pennsylvania* (1925) 268 U.S. 473 [69 L.Ed. 1058, 45 S.Ct. 603, 42 A.L.R. 316], the high court invalidated the portion of Pennsylvania's death tax law that sought to impose exactions directly on tangible property, the largest part of which consisted of a New York art collection. The court held that "while a State may so shape its tax laws to reach every object which is under its jurisdiction it cannot give them any extraterritorial operation." (*Id.*, at p. 489 [69 L.Ed. at p. 1062].) *Frick* thus emphasizes that a *direct* tax on out-of-state personal and real property constitutes a reach of constitutionally impermissible dimension.

California's regulation, when evaluated in light of *Frick,* must be viewed as steering a course entirely clear of extraterritorial overreaching. Neither on its face nor as applied by the Controller does the regulation purport to exact taxes from property in Texas.

On the contrary, the regulation's pick-up authority is expressly limited to "an amount which bears the same *ratio* to the difference between the total of taxes imposed by all of the states and the maximum state tax credit as the net value of *property subject to the Inheritance Tax Laws of this State* bears to the net value of property subject to the inheritance tax laws of all the states." (Italics added.) (Cal. Admin. Code, tit. 18, §§ 13441-13442.) By taxing no more of the credit differential than can be linked directly to decedent's California estate assets, our regulation transcends the narrow objective of simply avoiding extraterritorial taxation condemned by *Frick* and serves as an inherent guard against infringement of death or pick-up taxes assessed by Texas.

The executor here relies almost exclusively on the third high court case: *Treichler v. Wisconsin* (1949) 338 U.S. 251 [94 L.Ed. 37, 70 S.Ct. 1]. He argues that our regulation manifests the same constitutional vice as Wisconsin's emergency tax, namely, an alleged *indirect* tax on tangible property located out of state. In reality, however, calculation of California's pick-up and Wisconsin's emergency taxes differ in three critical aspects. And while only one such difference formed the basis for invalidation of Wisconsin's levy in *Treichler,* all three illustrate ways in which our regulation assures a fairer, more meticulously apportioned determination of pick-up tax than does Wisconsin's emergency formula.

California's regulation restricts this state's share of the credit differential to the apportioned 45.3131

percent of decedent's estate represented by California assets; we also subtract out all other states' death taxes. In marked contrast, the Wisconsin emergency tax involves a failing of this precise restriction. In *Treichler* decedent's estate consisted of 87.52 percent assets subject to Wisconsin taxing authority and 12.48 percent taxable in Florida and Illinois. Oblivious to the need for apportionment, however, the emergency tax allowed Wisconsin to pick up 100 percent of the federal credit remaining after deduction of Florida and Illinois death taxes—thus including a credit differential properly belonging to Florida and Illinois—and thereby forcing an *indirect* tax on foreign state property. Affirming the *Frick* rule that states may neither directly nor indirectly tax tangible out-of-state property, *Treichler* likened *Frick's* illicit death tax to Wisconsin's emergency tax: "Wisconsin's statute may be more sophisticated than Pennsylvania's, but in terms of ultimate consequences this case and the *Frick* case are one. It is quite unnecessary to know in either case what property is located within the taxing jurisdiction in order to compute the challenged exaction." (*Id.*, at p. 256 [94 L.Ed. at p. 42].)

California's regulation departs markedly from the nonapportioning, pecuniarily acquisitive approach exemplified by the condemned Wisconsin emergency tax. The very essence of our regulation is a strict limitation on pick-up taxation according to the exact percentage of decedent's property located within this state's taxing jurisdiction and a complete deference to both death and pick-up taxes claimed by other jurisdictions. Therefore, unlike *Frick* and *Treichler*, our regulation asserts no direct or indirect claim to death taxes assessed by Texas and leaves totally untouched Texas' 51.6869 percent share of federal credit subject to that state's pick-up authority. Unlike Wisconsin's emergency tax, moreover, our pick-up regulation deducts the full impact of California death taxes prior to calculation; we thus ensure that our own death taxes will be assessed only once. Finally, while Wisconsin's emergency tax required that a flat 30 percent rate be employed, once again heedless to the proposition of estate property subject to tax by that state, our regulation contains no fixed percentage that disregard out-of-state property.

In the years since *Treichler* the high court has not issued a single decision dealing with the constitutionality of death or pick-up taxes challenged for their jurisdictional reach. Several opinions addressing the constitutional imposition of state use and gross receipts taxes, however, provide a clear indication that contemporary judicial tolerance for the jurisdictional reach of state taxation is considerably broader than in 1949 when *Treichler* was decided. (See, e.g., *Complete Auto Transit, Inc. v. Brady* (1977)* ..... U.S. ..... [..... L.Ed.2d ....., ... S.Ct. .....]; *Scripto v. Carson* (1960) 362 U.S. 207 [4 L.Ed.2d 54, 80 S.Ct. 52]; *Standard Steel Co. v. Wash. Revenue Dept.* (1975) 419 U.S. 560 [42 L.Ed.2d 719, 95 S.Ct. 706]; for the California approach, see *Sea-Land Service, Inc. v. County of Alameda* (1974) 12 Cal.3d 772, 781-788 [117 Cal.Rptr.

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448, 528 P.2d 56].) This unmistakable trend of tolerance for state taxation serves to emphasize the weak foundation upon which *Treichler* rests.

As I have indicated above, the instant matter is readily distinguishable from *Treichler*, but even if not, that case may not be read to undermine in any way the California regulation's constitutional reach. Even if the majority's interpretation of *Treichler* were convincing, there is sufficient doubt of *Treichler's* continued vitality to render its precedential value very slight. Certainly it should not control our determination of the validity of a regulation of this state that has survived more than three decades.

Basically the executor complains of California's comparatively larger total tax bill notwithstanding Texas jurisdiction over a greater proportion of decedent's total estate. He overlooks the underlying reason: Texas residents enjoy a death tax rate considerably lower than the prevailing California rate. (Compare Rev. & Tax. Code, §§ 13404-13406 with Tex. Tax-Gen. Ann., arts. 14.02-14.06, and art. 14.12, subd. (D) (Vernon).) Due to the sizeable variation in death tax rates, California's smaller share of the credit differential ($498,485.87 versus $1,065,464.30 for Texas), while reflecting a perfectly apportioned share of estate assets wholly within this state's jurisdiction, nevertheless fails to offset the larger combined death and pick-up tax burden assessed by California ($2,007,775.19 versus $1,863,291.14 for Texas).

Ignoring the independent legitimacy of California entitlement to assess death and other taxes on in-state

property at whatever nonconfiscatory rate is desired (see, e.g., *Estate of Good* (1963) 213 Cal.App.2d 45, 48-50 [28 Cal.Rptr. 378]; *Pittsburgh v. Alco Parking Corp.* (1974) 417 U.S. 369, 373-378 [41 L.Ed.2d 132, 136-139, 94 S.Ct. 2291]), the executor lumps together death and pick-up taxes for purposes of interstate comparison, discovers that total taxes in California ($2,007,765.19) slightly surpass the total in Texas ($1,863,291.14), and concludes that section 2011 of the Internal Revenue Code of 1954 constitutionally prevents California from levying taxes of more than 45.3131 percent of the entire federal credit. The conclusion is entirely unfounded, for the federal government under section 2011 in no way attempts to influence the rate or application of California death taxes. Death taxes remain purely within the discretion of individuals states, and the federal credit statute does no more than encourage states to pick up the maximum amount of federal estate tax dollars returnable under its aegis to the state treasury.

The executor next contends that since California's aggregate death and pick-up obligation exceeds 45.3131 percent of the federal credit, the regulation operates discriminatorily and actually imposes an unconstitutional tax on part of the estate's Texas assets. Whatever inequality occurs in the system, however, derives from factors extraneous to the operation of the California regulation and owes its existence to accepted legal rules. In accounting for larger aggregate death and pick-up taxes in this state than in Texas, once again the simple explanation is that California im-

poses death taxes on assets within its jurisdiction at higher rates than Texas. Case law clearly provides that states have an independent right to a proportionate share of the credit differential irrespective of whether double or triple payments are thereby mandated. Thus, *Estate of Good, supra,* 213 Cal.App.2d 45 and *Estate of Amar* (1967) 255 Cal.App.2d 404 [63 Cal.Rptr. 444], properly spurned due process and equal protection challenges to the pick-up tax and held that estate taxpayers must pay California its full share of the credit differential regardless of whether another taxing entity, such as the federal government, collects the same credit differential, refuses to refund any part of that credit differential to this state or the executor, and thereby forces double or multiple taxation in excess of the calculated credit differential. The United States Treasury, moreover, has accepted the principles of *Good* and *Amar.* (See Rev. Rul. 70-272, 1970-1 Cum. Bull. 187.) That ruling provides that taxation of the same asset by two different states, even if deemed double taxation, qualifies under the federal credit and will be honored by the federal government.

California is therefore empowered, without necessary reliance on any of the regulation's allegedly discriminatory features, to pick up its proportionate 45.3131 percent share of the credit differential and, further, to collect death taxes on estate assets within this state's jurisdiction at higher rates than Texas imposes on property subject to its jurisdiction.

The executor's characterization of the regulation as discriminatory, therefore, disregards this state's recognized, autonomous rights and misdirects responsibility for multistate discrepancies.[1] Ascribing blame for such discrepancies to incomplete federal credit provisions that fail to apportion at the federal level, the Florida Supreme Court observed: "[T]he defect is in the federal law which does not require the proper allotment of the credit as between the states having taxable interest in the property belonging to the estate of a particular decedent." *(Green v. State* (Fla. 1964) 166 So.2d 585, 590.) In my opinion the regulation operates free of discriminatory shortcomings and in furtherance of the state's revenue-generating interest.

Lastly and as somewhat of an afterthought, the executor maintains that the regulation constitutes an improper delegation of administrative authority. Statutory delegation of authority in the present case confers upon the Controller a broad grant of power to *issue, administer, and enforce* death and pick-up tax regulations. Specifically, Revenue and Taxation Code section 14740 provides that "The Controller may make and enforce rules and regulations relating to the administration and enforcement of [death and pick-up

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[1]As stated in the context of death taxation by the high court in *Bugbee,* "inequalities that result not from hostile discrimination, but occasionally and incidentally in the application of a system that is not arbitrary in its classification, are not sufficient to defeat the law." *(Maxwell v. Bugbee, supra,* 250 U.S. 525, 543 [63 L.Ed. 1124, 1133]; accord, *Estate of Good, supra,* 213 Cal.App.2d 45, 52; see also *Sea-Land Service, Inc. v. County of Alameda, supra,* 12 Cal.3d 772, 780.)

taxes], and may prescribe the extent, if any, to which any ruling or regulation shall be applied without retroactive effect."

The Controller responds that the regulation furthers equitable administration and enforcement of the pick-up tax in two distinct ways: (1) it respects other states' death taxes by subtracting out their full amounts *before* seeking to retain any portion of the federal credit, and (2) it promotes equality by apportioning the credit differential according to the percentage of decedent's property subject to each state's jurisdiction. Thus, years prior to *Treichler* and the uniform act, the Controller perceptively anticipated the future direction in the death tax field and structured California's system accordingly. The Controller could and did reasonably conclude, as early as 1945, that the Legislature's unambiguous grant of administration, enforcement, and prescription power over pick-up tax rules and regulations justifiably warranted adoption of the regulation to promote its objectives of deference and equitable apportionment. The regulation, therefore, should be sustained as a reasonable delegation of authority.

Finally, we must ascertain whether the regulation is "reasonably necessary." In so doing this court should defer to the agency's expertise and refuse to "superimpose its own policy judgment upon the agency in the absence of an arbitrary and capricious decision." *(Pitts v. Perluss* (1962) 58 Cal.2d 824, 832 [27 Cal.Rptr. 19, 377 P.2d 83]; accord, *Morris v.*

Williams (1967) 67 Cal.2d 733, 749 [63 Cal.Rptr. 689, 433 P.2d 697]; *Agricultural Labor Relations Board v. Superior Court* (1976) 16 Cal.3d 392, 441 [128 Cal. Rptr. 183, 546 P.2d 687], app. dism. (1976) .... U.S. .... [50 L.Ed.2d 63, 97 S.Ct. 33, 34].) Nor, in passing judgment on the Controller's decision to adopt the particular regulation under challenge, may we consider the possible sagacity or superiority of alternatives: "[T]his court does not inquire whether, if it had power to draft the regulation, it would have adopted some method or formula other than that promulgated by the [agency]. The court does not substitute its judgment for that of the administrative body." *(Pitts v. Perluss, supra,* 58 Cal.2d 824, 834-835.) Thus we must not venture to speculate, for example, on the economic advisability or purported advantages of an apportionment formula that calculates this state's share of the federal credit on a gross rather than net basis. To undertake the task of second-guessing the Controller would exceed the bounds of judicial propriety, frustrate the legislative policy of reliance upon the special competence of an administrative agency, and transgress our narrow function of determining only whether the Controller employs a reasonable, nonarbitrary method to further the administrative purpose. (See *Ralph's Grocery Co. v. Reimel* (1968) 69 Cal.2d 172, 180 [70 Cal.Rptr. 407, 444 P.2d 79].)

In sum I cannot agree that the Controller's decision to use a regulation that encourages equitable appor-

tionment and total noninterference with sister state death tax exactions is arbitrary or capricious in violation of what constitutes "reasonable necessity." If anything the regulation makes an uncommon attempt to achieve both deference and equity in an arena often identified as rife with tax-gathering aggressiveness and chauvinism. It deserves to be sustained.

I would reverse the trial court's order and reinstate the tax referee's determination requiring the executor to pay the Controller $498,485.87 in delinquent taxes.

Appendix B

STATUTES

Section 13441 of Revenue & Taxation Code:

"In the event that a federal estate tax is payable to the United States in a case where the inheritance tax payable to this State is less than the maximum state tax credit allowed by the federal estate tax law, a tax equal to the difference beween the maximum credit and the inheritance tax payable is hereby imposed."

Section 13442 of Revenue & Taxation Code:

"If no inheritance tax is payable to this State in a case where a federal estate tax is payable to the United States, a tax equal to the maximum state tax credit allowed by the federal estate tax law is hereby imposed."

Regulation 13441-2:

"In a case where a decedent leaves property the transfer of which is subject to the Inheritance Tax Law of this State, and leaves other property which is subject to the inheritance tax laws of other states, and the total of the taxes imposed by all of the states (excluding any additional or pick-up tax from any state's tax) is less than the maximum state tax credit allowed against the federal estate tax on the total estate by the federal estate tax law, an additional tax will be imposed by California in an amount which bears the same ratio to the difference between the total of the taxes imposed by all of the states and the maximum state tax credit as the net value of the property subject to the Inheritance Tax Law of this State bears to the net value of the property subject to the inheritance tax laws of all the states."

[Sec. 2011]

SEC. 2011. CREDIT FOR STATE DEATH TAXES.

[Sec. 2011(a)]

(a) IN GENERAL.—The tax imposed by section 2001 shall be credited with the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or Territory or the District of Columbia, in respect of any property included in the gross estate (not including any such taxes paid with respect to the estate of a person other than the decedent).

[Sec. 2011(b)]

(b) AMOUNT OF CREDIT.—The credit allowed by this section shall not exceed the appropriate amount stated in the following table:

If the taxable estate is:	The maximum tax credit shall be:
Not over $90,000	8/10ths of 1% of the amount by which the taxable estate exceeds $40,000.
Over $ 90,000 but not over $ 140,000	$400 plus 1.6% of the excess over $90,000.
Over $ 140,000 but not over $ 240,000	$1,200 plus 2.4% of the excess over $140,000.
Over $ 240,000 but not over $ 440,000	$3,600 plus 3.2% of the excess over $240,000.
Over $ 440,000 but not over $ 640,000	$10,000 plus 4% of the excess over $440,000.
Over $ 640,000 but not over $ 840,000	$18,000 plus 4.8% of the excess over $640,000.
Over $ 840,000 but not over $ 1,040,000	$27,600 plus 5.6% of the excess over $840,000.
Over $ 1,040,000 but not over $ 1,540,000	$38,800 plus 6.4% of the excess over $1,040,000.
Over $ 1,540,000 but not over $ 2,040,000	$70,800 plus 7.2% of the excess over $1,540,000.
Over $ 2,040,000 but not over $ 2,540,000	$106,800 plus 8% of the excess over $2,040,000.
Over $ 2,540,000 but not over $ 3,040,000	$146,800 plus 8.8% of the excess over $2,540,000.
Over $ 3,040,000 but not over $ 3,540,000	$190,800 plus 9.6% of the excess over $3,040.000.
Over $ 3,540,000 but not over $ 4,040,000	$238,800 plus 10.4% of the excess over $3,540,000.
Over $ 4,040,000 but not over $ 5,040,000	$290,800 plus 11.2% of the excess over $4,040,000.
Over $ 5,040,000 but not over $ 6,040,000	$402,800 plus 12% of the excess over $5,040,000.
Over $ 6,040,000 but not over $ 7,040,000	$522,800 plus 12.8% of the excess over $6,040,000.
Over $ 7,040,000 but not over $ 8,040,000	$650,800 plus 13.6% of the excess over $7,040,000.
Over $ 8,040,000 but not over $ 9,040,000	$786,800 plus 14.4% of the excess over $8,040,000.
Over $ 9,040,000 but not over $10,040,000	$930,800 plus 15.2% of the excess over $9,040,000.
Over $10,040,000	$1,082,800 plus 16% of the excess over $10,040,000.

[Sec. 2011(d)]

(d) BASIC ESTATE TAX.—The basic estate tax and the estate tax imposed by the Revenue Act of 1926 shall be 125 percent of the amount determined to be the maximum credit provided by subsection (b). The additional estate tax shall be the difference between the tax imposed by section 2001 or 2101 and the basic estate tax.

Source: Secs. 810, 813(b), 935, 1939 Code, substantially unchanged.

[Sec. 2011(e)]

(e) LIMITATION IN CASES INVOLVING DEDUCTION UNDER SECTION 2053(d).—In any case where a deduction is allowed under section 2053(d) for an estate, succession, legacy, or inheritance tax imposed by a State or Territory or the District of Columbia upon a transfer for public, charitable, or religious uses described in section 2055 or 2106(a)(2), the allowance of the credit under this section shall be subject to the following conditions and limitations:

(1) The taxes described in subsection (a) shall not include any estate, succession, legacy, or inheritance tax for which such deduction is allowed under section 2053(d).

(2) The credit shall not exceed the lesser of—

(A) the amount stated in subsection (b) on a taxable estate determined by allowing such deduction authorized by section 2053(d), or

(B) that proportion of the amount stated in subsection (b) on a taxable estate determined without regard to such deduction authorized by section 2053(d) as (i) the amount of the taxes described in subsection (a), as limited by the provisions of paragraph (1) of this subsection, bears to (ii) the amount of the taxes described in subsection (a) before applying the limitation contained in paragraph (1) of this subsection.

(3) If the amount determined under subparagraph (B) of paragraph (2) is less than the amount determined under subparagraph (A) of that paragraph, then for purposes of subsection (d) such lesser amount shall be the maximum credit provided by subsection (b).

Appendix C

(CERTIFIED FOR PUBLICATION)

In the Court of Appeal
State of California
First Appellate District

DIVISION FOUR

1 Civil No. 34905
(Sup. Ct. No. 18150)

The Estate of
INEZ G. FASKEN,
Deceased.

DAVID FASKEN,
Executor, Objector and Respondent.

vs.

KENNETH CORY, State Controller,
Petitioner and Appellant.

[Filed Nov. 7, 1975]

OPINION

Inez G. Fasken, a resident of Marin County, died, leaving her entire estate to David Fasken the taxpayer-objector. She left a gross estate of $25,015,575.50,

of which 54.6869 percent was located in Texas and 45.3131 percent in California. The maximum federal estate tax credit allowed to the states under section 2011 of the Internal Revenue Code for an estate of this size is $3,407,198.33.

The crux of this appeal is the constitutionality of California's method of calculating an additional inheritance tax under California Inheritance Tax Regulations 13441-13442. California computed its tax under this regulation by the following calculations:

Texas' normal inheritance tax	$ 797,826.84
California's normal inheritance tax	$1,509,279.32
Total	$2,307,106.16
Total Federal Credit	$3,407,198.33
Less: Total normal inheritance tax	$2,307,106.16
Excess Federal Credit	$1,100,092.17
Percentage of estate located in California	45.3131
California share of excess federal credit	$ 498,485.87
Plus: California's normal tax	$1,509,279.32
Total tax due in California	$2,007,765.19

The problem arises due to the fact that Texas has a pickup statute which takes precedence over its normal inheritance tax in cases involving a federal estate tax credit. Under its pickup statute the percentage of the estate in Texas (in this case 54.6869) is multiplied by the total credit available to all the states (in this case $3,407,198.33) for a total tax of $1,863,291.14. As Texas actually taxed and collected this amount the

taxpayer argues that there is only $34,627.87 excess federal credit to be picked up by the State of California. The Inheritance Tax Referee calculated the excess federal credit on the basis of Texas' normal tax (as is required by Regulations 13441-13442) and additional tax of $498,485.87 was found owing to the State of California.

Taxpayer Fasken filed an objection to this report on December 8, 1972, which was sustained by the Superior Court of the County of Marin. The Controller of the State of California made a timely appeal from this judgment on December 31, 1973.

Section 2011 of the Internal Revenue Code provides a federal estate tax credit, within specified maximum limits, for any estate, inheritance, legacy or succession taxes actually paid to any state. As a state's normal inheritance tax does not generally absorb all of the federal estate credit, most states have imposed an additional tax to pick up any excess. In California, sections 13441-13442 of the Revenue and Taxation Code were adopted for this purpose.

"§ 13441. In the event that a Federal estate tax is payable to the United States in a case where the inheritance tax payable to this State is less than the maximum State tax credit allowed by the Federal estate tax law, a tax equal to the difference between the maximum credit and the inheritance tax payable is hereby imposed."

"§ 13442. If no inheritance tax is payable to this State in a case where a Federal estate tax is payable

to the United States, a tax equal to the maximum State tax credit allowed by the Federal estate tax law is hereby imposed."

This additional tax, commonly referred to as a "pickup tax," enables the state to divert into its own treasuries, without any additional burden to the taxpayer, money which would otherwise be exacted by the federal authority. (Estate of Good, 213 Cal.App.2d 45.) The California Inheritance Tax Regulations 13441-13442 interpret the pick-up statutes in situations in which the decedent leaves property in two or more states.

"Reg. 13441-13442. In a case where a decedent leaves property the transfer of which is subject to the Inheritance Tax Law of this State, and leaves other property which is subject to the inheritance tax laws of other states, and the total of the taxes imposed by all of the states (excluding any additional or pick-up tax from any state's tax) is less than the maximum state tax credit allowed against the federal estate tax on the total estate by the federal estate tax law, an additional tax will be imposed by California in an amount which bears the same ratio to the difference between the total of the taxes imposed by all of the states and the maximum state tax credit as the net value of the property subject to the Inheritance Tax Law of this State bears to the net value of the property subject to the inheritance tax laws of all the states.

"As to disallowance of the 5 percent discount for prompt payment of inheritance tax under Section

14161 if additional tax is imposed under Section 13441 or 13442, see Regulation 14161."

The taxpayer, in the lower court and on appeal, contends that the additional tax of $498,485.87, which was assessed against his estate under the regulation is illegal and violates the due process clauses of the California and United States Constitutions in that it taxes property located outside the state's jurisdiction. The court below held that although the *statute* is constitutional so long as it is read to impose a tax only on California property, the *regulation* on the other hand, could not be saved.

The law is unambiguous that "with respect to real property and *tangible* personal property, . . . the only state which may constitutionally levy an inheritance tax is the one where the property is located at the time of the decedent's death, and not the state of his domicile." (Marsh, *Multiple Death Taxation In The United States,* 8 U.C.L.A. L.Rev. (1961) 69, 70; Frick v. Pennsylvania, 268 U.S. 473; Treichler v. Wisconsin, 338 U.S. 251.) All of the property involved in this case is either tangible personal property or realty. This property can be taxed only by the state in which it is located. A decedent's domicile is a basis for jurisdiction only in cases dealing with intangible property.

Taxpayer Fasken, in support of his contention that California is taxing property outside its jurisdiction, relies on the United States Supreme Court decision, *Treichler v. Wisconsin, supra,* 338 U.S. 251. In *Treichler,* the court held that Wisconsin's Emergency Inheritance Tax was invalid in that it taxed tangible property outside the state's jurisdiction. "But when a state reaches beyond its borders and fastens upon tangible property, it confers nothing in return for its exaction. Since the state of location has all but complete dominion over the physical objects sought to be measured for tax [citations], no other state can offer a *quid pro quo.* A state is not equipped with the implements of power and diplomacy without its boundaries which are at the root of the Federal Government's undoubted right to measure its tax upon foreign property. [Citations.] And if the state has afforded nothing for which it can ask return, its taxing statute offends against that due process of law it is our duty to enforce.

"We hold that Wisconsin's emergency inheritance tax is invalid insofar as it is measured by tangible property outside Wisconsin." *(Id.,* at pp. 256-257.)

Although the calculations in *Treichler* are similar to those of California in the present case, we agree with the state controller that the instant case is not controlled by the result in *Treichler.* The state contends that *Treichler* is not precedent for the taxpayer's position because it considers a 30 percent *emergency* tax rather than an *inheritance* tax. This fact is not controlling as the tax was imposed on the transfer of property on the death of an individual, and the basic constitutional issues involved are the same as in the present case. What is significant is that the Supreme Court expressly did not consider the question presented by the California regulation—that is, whether a

state would be taxing property outside its jurisdiction should it multiply the percentage of property within the state by the federal credit remaining after the normal state taxes are subtracted.

The controller argues that as the decedent died a domiciliary of California, the state could constitutionally tax the entire estate, citing ***Maxwell v. Bugbee,*** 250 U.S. 525. The ***Maxwell*** case, however, was not that broad. ***Maxwell*** held that where an estate consists of assets in two or more states, the inheritance tax can first be ascertained on the *entire* estate and is then apportioned and assessed in the proportion that the taxable estate within the state bears to the entire estate. That is, a state can consider the entire estate for purpose of setting the tax *rate,* but for purpose of measuring the tax due, only property within the jurisdiction of the state can be used. The amount of the federal tax credit is based on the value of the total taxable estate. But the division of that credit between the several states involved must be in proportion to the value of estate within each of those several states.

Thus, California could, if the statute so provided, levy a tax that is the same amount as the whole federal tax credit as long as that tax is not measured by property outside of California. But, when California claims 58 percent of the whole federal tax credit, by first taking its normal inheritance tax (and Texas taking its inheritance tax), and then claiming 45 percent of the remainder, it is measuring the tax, in part, by property in Texas, and the tax therefore is unconstitutional.

The statute, however, does not require this result. It is a basic principle of statutory construction that a statute susceptible of two interpretations will, if possible, be construed as constitutional. (Shealor v. City of Lodi, 23 Cal.2d 647, 653; Palermo v. Stockton Theatres, Inc., 32 Cal.2d 53, 60.) It is true, as the controller contends, an administrative application of the language of an act is entitled to respect by the courts, and unless clearly erroneous, is a significant factor to be considered. (Mantzoros v. State Bd. of Equalization, 87 Cal.App.2d 140, 143.) However, if the administrative application will result in an unconstitutional interpretation, it cannot be followed.

The purpose of the "pick-up tax" (Rev. & Tax. Code, § 13441) is to give to the state or states the whole federal tax credit in the event the normal inheritance does not equal the tax credit. This is the purpose and legislative intent of Revenue and Taxation Code section 13441.

The statute must be read in the light of constitutional due process. The statute, on its face, contemplates a situation in which only property in California is involved, so in applying the statute to an estate with real property in several states, the statute must be interpreted so as to be within the rule of ***Maxwell.***

The controller, in the interpretation of section 13441, relies on the ***Estate of Good, supra,*** 213 Cal.App.2d 45. ***Good,*** however, did not involve property in two or more states. The fault of the controller's reliance in ***Good*** in interpreting section 13441 in the instant case lies not in the fact that it results in a higher tax for

the taxpayer but in the fact that the tax due is measured by property outside the jurisdiction of the state.

The trial court construed the statute to bring it into conformity with the Constitution by holding that California was only entitled to that proportion of the federal tax credit as property within California bears to the total estate property. With this we agree.

The judgment is affirmed.

CERTIFIED FOR PUBLICATION.

Caldecott, P. J.

We concur:
Rattigan, J.
Christian, J.

(CERTIFIED FOR PUBLICATION)

In the Court of Appeal
State of California
First Appellate District

DIVISION FOUR

1 Civil No. 34905

The Estate of
INEZ G. FASKEN,
Deceased.

DAVID FASKEN,
Executor, Objector and Respondent,
vs.
KENNETH CORY, State Controller,
Petitioner and Appellant.

[Filed Dec. 3, 1975]

BY THE COURT:

The written opinion filed November 7, 1975 is amended on page 5, by deleting the words in the first paragraph: "All of the property involved in this case is either tangible personal property or realty. This property can be taxed only by the state in which it is located."

On page 8, fourth line of the last paragraph after the words "property within" add the words "the jurisdiction of."

The petition for rehearing is denied.

Dated Dec. 3, 1975.

Caldecott, P. J.

Appendix D

In the Superior Court of the State of California
in and for the County of Marin

No. 18150

In the Matter of the Estate

of

INEZ G. FASKEN,

Deceased.

[Filed May 30, 1973]

REPORT OF COMMISSIONER

This matter came on hearing assigned to me on objections to the Report of the Inheritance Tax Appraiser and having heard arguments by counsel, considered the briefs and the general law on the subjects, I make my report as follows.

Inez Fasken died a resident of Marin County, leaving tangible personal property and realty in the States of California and Texas. Approximately fifty-five (55%) percent of the property is in Texas and forty-five (45%) percent in California. The gross Federal Estate Tax was fixed at $17,305,166.97, and the credit allowable for payment of State Death Taxes, computed pursuant to Section 2011 of the Internal Revenue Code (objector's opening brief,

Exhibit "A"), is $3,407,198.33. This credit, of course, computed on the combined value of the California and Texas property. Upon the payment of the credit amount to the States of California and Texas either as inheritance taxes or as "pick-up" taxes pursuant to applicable statutes, the net estate tax demanded by the Government is $13,897,968.64. A dispute arises as to the proration of this credit amount between the States of California and Texas.

The following table represents basic calculations working with the maximum State tax credit and prorations according to property ratios applied against the credit. This table indicates the objector's basic premise regarding his theory of credit proration.

Gross Federal Estate	$25,015,575.50
Maximum State Tax Credit	3,407,198.33
California Percentage of Combined Estates	45.3131%
Texas Percentage of Combined Estates	54.6869%

The objector's calculations are very simple and would be in harmony, it appears, with the Texas method. He would apply to California that portion of the State tax credit that is represented by California's portion of the combined estates. This would be $1,543,907.19, or 45.3131 percent of the maximum State tax credit. Texas demanded and received the reciprocal amount, or $1,863,291.14, which is 54.6868 percent of the maximum State tax credit. Since the percentage of the credit allocable to California was

more than the California normal inheritance tax, the objector tendered to the California Controller the difference between the two presumably pursuant to Section 13441 of the Revenue and Taxation Code.

The normal California tax is $1,509,279.32. The credit dollars to which California is entitled according to the objector is $1,543,907.19, and the difference between these figures, $34,627.87 was paid to the Controller.

By California's computation, however, because of apparent differences in normal tax rates between California and Texas, the tax credit dollars should be prorated to California in an amount which exceeds the ratio its property bears to the whole estate, so that the taxpayer should pay, in addition to the normal California tax, $498,485.87, or approximately 59% of the tax credit money. Since Texas has already approved and collected a share of the credit which is equal to its proportionate share of the total property, the taxpayer is required to pay in excess of $450,000.00 additional money to satisfy the Controller's interpretation of this State's pick-up statute (Section 13441, Revenue and Taxation Code), and the regulation 13441 which interprets it.

The objector complains that this additional amount demanded by the Controller constitutes an illegal tax on property in Texas, and thus violates the due process clause of the California and United States Constitutions.

Revenue and Taxation Code Section 13441 reads as follows:

"Section 13441. Effect of Federal estate tax: Where State tax less than state tax credit allowed by Federal act. In the event that a Federal estate tax is payable to the United States in a case where the inheritance tax payable to this State is less than the maximum State tax credit allowed by the Federal estate tax law, a tax equal to the difference between the maximum credit and the inheritance tax payable is hereby imposed."

The interpretation of this section gives no problem where a California resident dies owning property only in California. The majority of the States have similar sections allowing the State to take advantage of the credit offered by the Federal Government through its regulations designed to share with the State some of the Federal estate tax money without imposing an additional burden on the taxpayer. The problem arises in interpreting Section 13441 when the California decedent leaves property in California and in another State or States.

To deal with this situation the Controller follows his regulation 13441-13442, which reads as follows:

"Reg. 13441-13442. Property Left in Two or More States. In a case where a decedent leaves property the transfer of which is subject to the Inheritance Tax Law of this State, and leaves other property which is subject to the inheritance tax laws of other states, and the total of the taxes imposed by all of the states (excluding any additional or pick-up tax from any state's tax) is less than the maximum state tax credit allowed against the federal estate tax on

the total estate by the federal estate tax law, an additional tax will be imposed by California in an amount which bears the same ratio to the difference between the total of the taxes imposed by all of the states and the maximum state tax credit as the net value of the property subject to the Inheritance Tax Law of this State bears to the net value of the property."

Following this regulation, the Controller computes the amount of the tax credit to which California is entitled as follows:

Texas Basic Tax	$ 797,826.84
California Basic Tax	1,509,279.32
Total	2,307,106.16
Total Federal Credit	3,407,198.33
Less Total Inheritance Tax	2,307,106.16
Free Money	1,100,092.17
California Share of Excess Credit	x 45.3131
Amount	498,485.87
Plus California Basic Tax	1,509,279.32
Total Tax Due California	$2,007,765.19

California's position is that although the results may seem unfair to the taxpayer in this particular instance, creating in effect an additional tax through the Federal and State credit and pick-up laws, this does not make the code section or the regulation unconstitutional. California points out that it has unlimited power to tax property transferred within its jurisdiction. The State takes the position that that is all it is doing in this particular case. The tax-

payer maintains that the State is illegally reaching beyond its borders and taxing the transfer of Texas property.

Many of the cases cited by the State of California to support its position are really dealing only with California property. There is no doubt that the State of California has power to fix a tax rate on its own property which would be 2 or 3 times the Federal credit applied to that property. See *Estate of Good,* 213 CA 2d 45. There the taxpayer paid the amount of the credit first to the Federal Government under the gift tax theory and a similar amount was demanded by the State on the theory of gift in contemplation of death. Since the taxpayer had already paid the amount to the Federal Government it asked that the credit be waived, but the Court held that the State of California had the power to fix an estate tax in addition to its regular inheritance tax whether or not it caused an additional burden upon the taxpayer and that this was the effect of Section 13441. (Inheritance taxes are succession taxes, a tax on the right to inherit which in California is graduated pursuant to the degree of relationship. An estate tax, such as that imposed by the Federal Government, is a tax on the entire estate being transferred on death. It has nothing to do with the degree of relationship to the decedent of the recipient. Where a State's inheritance tax is less than the Federal credit tax, the additional dollars picked up under such sections as 13441 are generally referred to as an estate tax payable to the State.)

The question here is whether California is exercising its inherent right to tax property within its jurisdiction in asking for this extra $463,858.00, or whether it is computing this tax in fact partly on the value of the property in Texas. If the latter is the case, then the statute and regulation interpreting it are unconstitutional as applied to this situation.

My report is that the additional amount requested in this case constitutes an unconstitutional levy on the passage of property the situs of which is in the State of Texas.

A leading case on this point is a 1949 United States Supreme Court case, *Treichler v. The State of Wisconsin,* 338 US 251. The decision appears as Exhibit "F" in the opening brief. There, Wisconsin, having 87½ percent of the total property in Wisconsin, Florida and Illinois, assessed a pick-up or "estate" tax in the sum of $352,701.79. The case resolves around the constitutionality of Wisconsin's Emergency Tax statute which permitted it to assess 30% of all death taxes collected whereby it assessed an additional 30% of this pick-up or estate tax. Wisconsin's computation was as follows:

Tax Credit	$630,709.62
Less Illinois Death Taxes	35,616.26
Less Florida Death Taxes	21,709.45
Less Wisconsin Death Taxes	220,682.12
Wisconsin Estate Tax	$352,701.79

Wisconsin took in addition its 30% emergency tax of both the $220,682.12 figure and the $352,701.79

figure for a total emergency tax of $172,015.20. The specific issue was whether the State could take the 30% of the $352,701.79. The United States Supreme Court held that it could not, but apparently that it could take 30% of 87½% of $352,701.79. The Court pointed out that since the Wisconsin normal inheritance tax was first subtracted and then added back in the formula, that the taxing formula could be reduced as follows, total Federal credit less Illinois tax, less Florida tax, times 30%. The Court pointed out that computing the 30% emergency tax, Wisconsin did not take into account its proportion of property to the whole, and thus it was basing its emergency tax in part, on property transferred in other jurisdictions. It said: "It made the [estate tax credit] its own, as it did not apportion that [credit] to the property within the State." It also said, "We hold that Wisconsin's emergency inheritance tax is invalid insofar as it is measured by . . . property outside Wisconsin." The Court made it clear that a State cannot impose a tax on property rated and measured in part by property outside of the State. It is necessary, the Court said, to know what property is located within the taxing jurisdiction in order to properly compute the tax. *Treichler* also seems to stand for the proposition that the total Federal estate tax credit measures and signifies the total property in the several States. This leads to the result that any tax computed on the total credit is equivalent to a tax computed on the total estate.

The State of California maintains that *Treichler* is not applicable to our situation because the emer-

gency tax is not a death tax or an inheritance tax. It is true that the emergency tax was not treated as one of those taxes, but it was a tax occurring on the transfer of property on the death of an individual, and the basic constitutional issues involved are the same as in our present case.

If California is measuring the tax it imposes upon property within its jurisdiction by computing the value of property without its jurisdiction in whole or in part, it is violating not only the rule in *Treichler,* but the earlier rule laid down by the United States Supreme Court in *Frick v. Commonwealth of Pennsylvania* (1924) 45 S. Ct. 603, cited and quoted in *Treichler. Frick* rejected the argument that Pennsylvania, in taxing transfer of property decedent owned there, could compute the tax on the combined value of that property and property in New York and Massachusetts. The Court pointed out that this would allow Pennsylvania to do indirectly what it could not do directly, that is, impose a tax on transfer of tangible property outside its jurisdiction.

I think that California is imposing a tax which is measured in part by the property in Texas. This appears from their very basic computation which is set forth above wherein the total Federal credit, representative of the total estate, becomes the basis for computing the tax on California property. This is true even though California does use its percentage of property in the computation wherein it takes approximately 45% of the "free money". The confusion arises because California adds back in its basic tax in

the computation. This calls to mind the formula used by Wisconsin which was reduced by the Court because the Wisconsin basic tax was first subtracted and then added. Although the computation is somewhat complicated, the California method can be similarly reduced so that the California basic tax is not added after having been subtracted. In the following figures I have used approximate amounts in millions.

3.4	=	total State tax credit
1.5	=	California normal inheritance tax
.8	=	Texas normal inheritance tax
.45	=	California % of total estate
.55	=	Texas % of total estate

Computation by California State Inheritance Tax Dept:

3.4	
— 1.5	(Circled figures indicate where California tax has been first
— .8	subtracted, then added in.)
1.1	
x .45	
.495	
+1.5	
1.995	as California tax

The above computation is equivalent to the following equation:

$$.45\,(3.4 - 1.5 - .8) + 1.5 = 1.995$$

Now, to eliminate the subtracting and then adding of the 1.5, the above is first rearranged to:

$$.45\ (3.4) + 1.5 - .45\ (1.5) - .45\ (.8) = 1.995$$

In the above we have the figures 1.5 — .45 (1.5), which equals .55 (1.5), thus eliminating the adding and subtracting of the 1.5's.

Therefore the equation is simplified to:

$$.45\ (3.4) + .55\ (1.5) - .45\ (.8) = 1.995$$

or

A.	.45	(3.4)	=	California % of property × total tax credit
B.	+.55	(1.5)	=	*Texas* % of property × normal California tax
C.	—.45	(.8)	=	California % of property × normal Texas tax
	1.995		=	California inheritance tax as computed by the State

B above illustrates how the Texas percentage of the property is used in the computation. The result of this formula is, as can clearly be seen by the reduction, that whenever line B is larger than line C, and the other State takes its full percentage of the credit as measured by the percentage of property in that State, the portion of the credit required by California will always cause a total demand on the taxpayer in excess of the total credit. It will also always result in California taking a greater percentage of the tax credit than the percentage of the total property allocated to California whether or not the other State follows the Texas computation. These results will obtain

in every case where the tax rate applied by California is higher than in other states. Thus the result of the rule is that a state with a higher tax rate also absorbs a higher percentage of the credit tax dollars than the percentage of the total property within its jurisdiction.

I shall now comment on various points taken up in the briefs and attempt to show how they fit into the picture. The objector attacks the State's interpretation and use of Revenue and Taxation Code Section 13441 on several grounds. First he says that it is unconstitutional as applied to situations where there is property in California and another State or States. The State of California contends that it is not because it simply taxes property within its own jurisdiction. I think that the section is clearly unconstitutional if applied to property in two or more States for the simple reason that *Treichler* holds that the total Federal estate tax credit represents the total estate. It is measured and rated on the total estate. (See Exhibit "A" of opening brief for method of computation of the credit.) To say that the State of California could pick-up the whole difference between its tax and the credit when part of the property is in another State is simply saying that the State of California can impose a tax measured in part by property in another State.

The objector next complains that the State of California attempts to alleviate this situation by means of its regulations. (See Regulation 13441-13442 quoted above.) The regulation, if not creating unconstitu-

tional results, is itself void because it attempts to modify a State statute. I agree with the objector on this point. The regulation goes beyond any reasonable or possible interpretation of Section 13441 and creates, in effect, new taxation legislation. This of course the Controller does not have the power to do. (I could see an interpretative regulation which would interpret the words of the section "maximum State tax credit allowed" and "maximum credit" to mean that portion of the credit which is attributable to California property. This could be a reasonable and logical conclusion and such a clarification would be welcome and necessary. But where the regulation attempts to take the total tax, subtract the "normal" taxes of California and other States, and then take the California percentage of the property times the difference, and then adds back the California normal tax, I think we have departed far afield from the original section and are attempting to legislate on an administrative level. The regulation, as has been shown, always results in adding in as part of the tax the percentage of property in the other State times the normal California inheritance tax. This certainly is completely outside the scope of Revenue and Taxation Code Section 13441.

Certainly the objector's point seems to be well taken that something is amiss somewhere when Federal and State statutes designed to create a credit for the benefit of the States by allowing the States to take, in some instances, extra tax dollars without intending to burden the taxpayer, create a situation where

almost half a million dollars of extra tax money is demanded. The intent and purport and the plain expression of Section 13441 seems to be that a tax is created by this State which is not in excess of the estate tax credit money. It is impossible to see how the State could reach its result under Section 13441 in the absence of the regulation, and the regulation should be struck down pursuant to authorities cited in the briefs by the objector. Even the Controller seems to admit that the regulation and the statute are two different entities for in his reply brief he asserts that the taxation in this case is pursuant to the regulation and not to the statute.)

The Controller argues that the regulation should be upheld because of its long use (30 years) and the cases which hold that a regulation which has been in use for a long time must be a reasonable interpretation which has worked satisfactorily over the years. The objector in his reply brief disturbs this position somewhat when he quotes a *Law Review* article in 1955 by Newell C. Barnett, Associate Inheritance Tax Attorney for the State of California. In the article Mr. Barnett examines the problem of applying Section 13441 to cases where there is property in two or more States and asserts that the present practice (1955) is to assess the tax under the code section (not mentioning the regulation at all) only in an estate where the California inheritance tax is less than that proportion of the total credit which the California estate bears to the decedent's whole estate. This computation would get the exact

result achieved by Texas, and applied to California would simply pick up the remaining tax credit dollars, or the amount of the tax credit that was produced by California property, and would impose no additional burden on the tax payer. Therefore I feel the regulation has not achieved the prestige and practicability urged by the State and that it is in fact illegal.

It should be noted that the regulation purports to except from the computation pick-up money collected by other States because of the Federal estate tax credit. In applying its regulation to our situation, the State of California computes the "normal" Texas tax as $797,826.84. There was never any authority presented for this, and the objector asks why the Controller in using the regulation formula should subtract this amount and not the additional $1,000,000.00 paid to Texas. It should be noted that if the regulation provided that the *total* taxes paid in other States should be deducted (including the pick-up dollars) an equitable result would result in this case for that portion of the credit which is equal to California's percentage of the property would be the amount left for California. Apparently Wisconsin's computation in *Treichler* did just this, and their section allowed the deduction of "the aggregate amount of all estates, [sic] inheritance, transfer, legacy and succession taxes paid to any State or territory . . . in respect to any property in the estate of said decedent." There is nothing said therein, as there is in the California regulation, about excluding any

additional or pick-up tax, and when Wisconsin subtracted the total Illinois and Florida taxes, it simply picked up the credit dollars remaining on the table. The objector, seeking a result equitable to him, asks why California should not apply the same procedure.

The State defends its use of the statute and the regulation on the grounds that similar laws are in effect in other States and that when such other States are involved with California the result is always equitable because it does not result in exceeding the credit tax dollars although it may result in one State taking a higher percentage of them than the percentage of its property to the whole and the other State taking a lesser percentage of them than its percentage of property to the whole, a result obtaining because of different taxing rates in the two States. In short, when California is dealing with another State with identical computations, a reciprocity exists which keeps the tax demand within the bounds of the State tax credit maximum. The Controller says, in effect, that such a result is not unconstitutional and therefore the statute and regulation should stand even though unfortunate results may result from fact situations where other States have different methods of computing tax. Where reciprocity exists, and there is no additional burden on the taxpayer, a question as to the constitutionality would normally not be raised. Neither of the two States is going to raise the issue because the tax is computed pursuant to their laws. The taxpayer is not going to raise the issue because he must pay the tax either to State

treasuries or the Federal Government. It makes no monetary difference to him. Whether a constitutional issue is involved, I do not know, and this is not an issue here. But where reciprocity is not involved, and California attempts to impose this computation unilaterally, and where, as here, this computation produces an additional and substantial tax, there is someone to raise the issue and the constitutionality of that unilateral application should be examined. I just do not think that this formula promulgated in the regulation applied unilaterally is constitutional. For the California system to work out, all States would have to have similiar rules. The "Uniform Death Tax Credit Act" a copy of which is appended to the Controller's brief, proposes a general acceptance of what amounts to the California system of computation. Unfortunately, this Uniform Act has not been enacted by any of the States and the proposed act has been dropped by the conference into a category of "other acts", see exhibit to executor's reply brief.

As part of the total picture, I think the Federal Revenue ruling 56-230 deserves some comment. Part of the reason for this ruling was apparently the decision in the *Treichler* case. It relates to an instance where the Federal Government will not permit a State to take more of the Federal credit than that percentage which is equal to the State's percentage of all the property. The fact situation involves a nonresident not a citizen of the United States who died owning real property in State A and intangible personal property in State B, all of which was in-

cluded in the gross estate and subject to the Federal estate tax. Both States specifically exempt from death taxes the intangibles. A has a typical pick-up section as California has. B assesses no tax at all. A therefore interprets its pick-up section as California would using the regulation and requires the estate to pay the entire difference between the normal inheritance tax and the full Federal credit. The regulation states that State A has no power to tax the transfer of intangible personal property of the decedent's estate which lies outside its jurisdiction, citing the *Frick* case and other cases. It further states that a State, being without power to tax directly the transfer of property outside its jurisdiction, cannot accomplish the same thing indirectly by taking the whole of the decedent's estate as a basis for measuring the tax on the transfer of that part of the estate which lies within its jurisdiction, citing the *Treichler* case. The ruling concludes: "It will be the policy of the Internal Revenue Service to disallow as a credit the full amount of the additional estate tax which State A has asserted in the instant case and in all other cases where the State is asserting a tax not in consonance with the decision in *Treichler*, . . . Accordingly, the allowance of credit under Section 813(b) of the 1939 Code is limited in the instant case and will be limited in all similar cases *to the proportion of the full Federal credit allowable to the estate which is attributable to that part of the gross estate situated in State A.*" (Italics added.)

This, of course, diverts the unallocated credit dollars into the Federal Treasury. The State of Cali-

fornia says that this revenue ruling is not significant here in that it rests upon *Treichler* and that case did not involve an inheritance or estate tax. I do not agree. The Federal Government is obviously applying *Treichler* to inheritance and estate tax situations. Although the ruling does not apply to our situation, and although it has not been tested as the State points out, it does show the interpretation given by the Federal Government to both *Frick* and *Treichler* and presents a broad basis, supported by those decisions, for holding that the total Federal estate tax credit represents the total estate of the decedent and taking more of the credit than is allocable to property in the State is tantamount to collecting a tax on the transfer of property in the other State. The State of California would attempt to vitiate this regulation further by saying that it does not apply to disputes between the States because "it is the policy of the Internal Revenue Service generally not to question the application of State death tax statutes or to intervene in controversies regarding their application." (Rev. Rule 60-88, Exhibit I, opening brief.) This may explain why the Federal Government will allow reciprocal situations where two States divide the credit dollars in different proportions than their properties bear to the whole without comment, but will step in and require a prorata taking of the tax dollars when the dispute is not between two States, but between a State and the Federal Government as in the example proposed in Revenue Ruling 56-230.

The State of California cites instances of double taxation to show that the mere fact that excess credit

dollars are being picked up even though they were not created by the Federal Government does not necessarily make the act unconstitutional. Some of these examples involve intangible property which apparently may be taxed at the domicile and at the situs. The State cites *Maxwell v. Bugbee,* 250 U.S. 525 as authority for the proposition that a State may impose a higher tax on account of property in other States. This case is cited at length in *Frick.* It was there pointed out that *Maxwell* "is on the borderline, as is evidenced by the dissent of four members of the Court." . . . "The tax there in question was one imposed by New Jersey on the transfer of stock in a corporation of that State. The stock was part of the estate of a decedent who had resided elsewhere. The State statute, described according to its essence, provided for a tax graduated in rate according to the value of the entire estate, and required that where the estate was partly within and partly without the State the transfer of the part within should bear a proportionate part of what according to the graduated rate would be the tax on the whole." By applying the total estate to its graduated scale, a tax of 3% was imposed, whereas if the value of the property within the State only were applied, the tax rate would be 2%. The Court in *Frick* concludes "There was no attempt, as here, to compute the tax in respect of the part within the State on the value of the whole. The Court sustained the tax, but distinctly recognized that the State's power was subject to constitutional limitations, including the due process clause of the 14th Amendment, and also that it would be a violation

of that clause for a State to impose a tax on a thing within its jurisdiction in such a way as to really amount to taxing that which is beyond its authority." These words draw the distinction between the *Maxwell* case and the instant case. The cases cited in the State's brief show instances where indirect duplicate taxation is not objectionable, but they do not show that California can impose a State tax on property without its jurisdiction, although it can impose an estate tax in any amount on property within its jurisdiction as long as that tax is not rated and measured by property outside its jurisdiction.

The State also argues that the U.S. credit dollars are simply a limit of allowance by the United States, and in no way limits the taxing power of the separate States. This may be true, but the United States Constitution limits that power, confining it to domestic property only.

Both sides present various illustrations showing how the taxing procedure proposed by the other side has inequitable results. There is no doubt that this problem of dividing the Federal estate tax dollars between two States has no simple solution unless all States enact a uniform rule, which they haven't. On one hand the Texas rule could work an inequity where California's normal tax exceeded the Federal estate tax credit. On the other hand, the California computation appears to be unfair where its tax rate is higher than that in the other State, and where the other State exacts that proportion of the credit which is attributable to the property within its

boundaries. It is perhaps not possible to devise a tax law at present which will produce equitable results as balanced against the tax laws of all the other States. It may well be that the fairness and constitutionality can only be determined by considering the laws of the two or more States together as a whole, necessitating proceeding in each individual instance as to constitutionality. In any event, the use of examples to show inequities under certain fact situations do not form a basis whereby the Court can say that the system is fair and constitutional because there is no way of achieving uniform fair results.

One final observation. Taxing procedures generally provide that the rate of taxes increase as the estate increases. Therefore when a Federal estate tax credit is computed on property in two States, this computation also being a scale graduated upward percentagewise, a higher tax credit which may then be collected by the States results than would result as to each State singly if only the property within that State were considered. Even when this credit is divided prorata according to the percentages of property within the State, a higher tax is paid because of the total property. In a sense, even then, each State is receiving a tax based in part on property in the other State. This practice is considered proper under such holdings as the *Maxwell* case cited above.

But to apply this comment to our situation, if there were no Texas property and the Federal credit were computed only on the California property of $10,933,424.00, a Federal estate tax credit would result

which would be substantially less than the California normal tax which would still be $1,509,279.32. Then, with Texas completely out of the picture, California would collect merely its normal tax and would receive no credit tax dollars. The existence of the Texas property, even following the rule urged by the taxpayer, which rule I think is just and should be followed, allows the State of California to collect an additional $34,627.87. This amount arises technically because of property outside California's jurisdiction. We say it is alright, perhaps because a tax is involved which is fixed by the Federal Government which is going to have to be paid by the taxpayer whether he pays it into State treasuries or to the I.R.S. We can't get too excited about that. If it must be paid, it must be paid, and there would be no argument if the States were satisfied if they got their prorata share. Maybe it's constitutional, maybe it's not, but we let it go and the I.R.S. doesn't like to intervene in controversies between the States. But when by California's computation an additional pick-up tax of $463,858.00 is produced out of California rules and regulations (not even having the dignity of State statute) I think the State has gone too far.

My report is that the objections to the Report of the Inheritance Tax Appraiser should be sustained and that the sum of $1,543,907.19 paid to the State Treasury constitutes the maximum amount of inheritance and estate tax which can be collected by the State of California. This amount should be subject to a proportionate revision if it appears there is an error in the return.

In light of the decision in this report, Objection #2 by the taxpayer which has to do with purported expenses of administration and tax computation which the State of California will not allow as deductions on the tax return becomes immaterial.

Dated: May 25, 1973

/s/ E. L. Nininger
E. L. Nininger
Court Commissioner

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Superior Court of the State of California
for the County of Marin

No. 18150

Estate of
INEZ G. FASKEN,
Deceased.

[Filed Nov. 5, 1973]

ORDER CONFIRMING REPORT OF COMMISSIONER AND ORDER FIXING INHERITANCE TAX

Earl D. Brown, the duly appointed, qualified and acting Inheritance Tax Referee in this Estate of Inez G. Fasken, deceased, filed herein his written Report of Inheritance Tax Referee dated October 13, 1972, and David Fasken, Executor and sole beneficiary under the Will of the deceased, filed written Objections thereto. The issues framed and presented by the said Report and the written Objections came on regularly for hearing on February 27, 1973, before E. L. Nininger, Court Commissioner, who thereafter prepared his Report of Commissioner dated May 25, 1973, which sustained the Objections and was filed herein on May 30, 1973.

Houston I. Flournoy, State Controller, then noticed his Motion Taking Exception to Report of Commis-

sioner which came on for hearing before this Court, Honorable Joseph Wilson presiding, on July 9, 1973.

The Court has considered the memoranda and oral argument of counsel, the applicable law, and the said Report of Commissioner and finds that the said Report correctly resolves the issues framed by the Report of Inheritance Tax Referee and the Objections thereto and the Report of Commissioner should be confirmed in all respects.

It Is Ordered that the Report of Commissioner is approved, adopted and confirmed in its entirety.

Accordingly, it is also ORDERED that the Report of Inheritance Tax Referee dated October 13, 1972, is in error as to the amount of Additional Tax due herein under Revenue and Taxation Code Sections 13441-2. The said tax is hereby fixed at $34,627.87.

It Is Hereby Adjudged, Ordered, and Decreed that the total inheritance tax due the State of California is fixed as follows:

Name and Relationship	*Amount of Tax*
David Fasken, Mutually Acknowledged Son	$1,509,279.32

and that the Additional Tax is fixed at $34,627.87.

Dated: November 5, 1973

/s/ Joseph G. Wilson,
Joseph G. Wilson,
Judge of the Superior Court

Approved as to form
Houston I. Flournoy, Controller
By William F. Seeley